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### Non-Pecuniary Interests and the Injudicious Limits of Appellate Standing in Bankruptcy

S. Todd Brown

*University at Buffalo School of Law*

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S. T. Brown, *Non-Pecuniary Interests and the Injudicious Limits of Appellate Standing in Bankruptcy*, 59 *Baylor L. Rev.* 569 (2007).

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NON-PECUNIARY INTERESTS AND THE INJUDICIOUS LIMITS OF  
APPELLATE STANDING IN BANKRUPTCY

S. Todd Brown\*

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\*Abraham L. Freedman Teaching Fellow, Beasley School of Law, Temple University, B.A. 1996, Loyola University of New Orleans; J.D. 1999, Columbia University. Craig Goldblatt and Duane Morse provided extremely helpful comments to earlier drafts of this article, as well as unwavering encouragement and support, for which I am eternally grateful.

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“It is safe to say that to be a ‘person aggrieved’ one must be directly and adversely affected pecuniarily by the order of the referee which is challenged. After all, practical common sense need not be entirely divorced from bankruptcy proceedings.”—Honorable John B. Sanborn, 1962<sup>1</sup>

## I. INTRODUCTION

In the four decades since Judge Sanborn’s common sense interpretation of the appellate standing requirements under the Bankruptcy Act of 1898,<sup>2</sup> federal bankruptcy law has evolved considerably—so much so that many of the common understandings and fundamental assumptions of that time have given way to other concepts of the role and function of bankruptcy. Even so, some elements of the process, including the application of the appellate standing test at issue in *Hartman*, remain in spite of the absence of an express statutory basis in the Bankruptcy Code.<sup>3</sup> Over time, the pecuniary interest requirement for appellate standing and other judicial constructions have become so ingrained in the process that their underlying rationale is no longer seriously questioned. However, recent changes to the Bankruptcy Code and the strained efforts of some courts to sustain the pecuniary limit suggest that the time to reframe bankruptcy appellate standing has arrived.

Under the 1898 Act, courts applied an express statutory distinction between standing in summary proceedings before a referee and appeals from orders issued in those proceedings. This distinction has no parallel in the Code, and the interests subject to an order of the referee were far more limited than bankruptcy court orders are today. As with *Hartman* and other cases applying a pecuniary standard under the Bankruptcy Act, early decisions extending the standard to appeals under the Bankruptcy Code centered on matters of asset collection and distribution; it is not at all clear that the variety of non-pecuniary interests that may arise and find resolution in bankruptcy court today were, or even could have been, considered. Unlike many pre-Code cases, however, modern appellate prudential standing in bankruptcy is customarily determined by a mechanical application of the pecuniary interest standard regardless of the nature of the rights and interests contemplated by the relevant provisions of the Code.

At the same time, the scope of interests addressed by, and adjustments to the operation of the bankruptcy system under the Code have greatly

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<sup>1</sup> *Hartman Corp. of Am. v. United States*, 304 F.2d 429, 431 (8th Cir. 1962).

<sup>2</sup> 11 U.S.C. §§ 101-1200 (1976) (repealed 1978).

<sup>3</sup> 11 U.S.C. §§ 101-1532 (2007).

expanded the circumstances in which significant non-pecuniary interests come into play. Some provisions do not appear to serve any party's direct pecuniary interest, and others both address discrete pecuniary matters and advance important non-pecuniary goals within the overall design of the bankruptcy system. The failure to recognize protected non-pecuniary interests and the objectives served by the involvement of those holding these interests may have the perverse effect of undermining the integrity of the process and encouraging manipulation of the provisions of the Code—results that every Congress that enacted, modified, or rescinded bankruptcy legislation throughout history sought to avoid.

## II. BANKRUPTCY STANDING UNDER THE CODE

### A. *The Form and Function of Standing Principles and the Separation of Powers*

Standing to appear and be heard is one of the most basic requirements of the American legal system. Nonetheless, courts and commentators may refer to one form of standing while applying the standards for another or indiscriminately merge discussions of standing with assessments of underlying substantive issues.<sup>4</sup> The confusion is understandable; the term “standing” captures judiciability concepts that overlap at the margins, and the analyses are often blurred.<sup>5</sup> The standards applied may be difficult to define with precision, and their requirements are not readily reduced to a mere “mechanical exercise.”<sup>6</sup> Even standards that seem reasonably precise on the surface may prove difficult to apply consistently in practice, particularly in light of the nature of the judicial role: a rationale that may be

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<sup>4</sup> See James C. Hill & Thomas E. Baker, *Dam Federal Jurisdiction!*, 32 EMORY L.J. 3, 15–16 (1983) (noting the potential influence of the merits of the substantive question presented); *accord* Baena v. KPMG L.L.P., 453 F.3d 1, 6 (1st Cir. 2006) (criticizing cases confusing *in pari delicto* doctrine with standing).

<sup>5</sup> See *Flast v. Cohen*, 392 U.S. 83, 98–99 (1968) (“Standing has been called one of ‘the most amorphous [concepts] in the entire domain of public law.’ Some of the complexities peculiar to standing problems result because standing ‘serves, on occasions, as a shorthand expression for all the various elements of justiciability.’”) (citations omitted); *FMC Corp. v. Boesky*, 852 F.2d 981, 988 (7th Cir. 1988) (“[T]he constitutional and prudential dimensions of standing must be kept separate; when the two are fused, standing law becomes confused.”); *In re Godon, Inc.*, 275 B.R. 555, 563 (Bankr. E.D. Cal. 2002) (noting the ambiguity of the term “standing”).

<sup>6</sup> See *Allen v. Wright*, 468 U.S. 737, 751 (1984) (prudential and constitutional standing incorporate “concepts concededly not susceptible of precise definition” and cannot be defined so as to make its application “a mechanical exercise”).

reasonable under the facts before the court may not be adaptable to other, perhaps unforeseen, circumstances. As one commentator noted:

The doctrine of standing is arguably the Hydra of American jurisprudence. Confusing and constantly changing, it has been called everything from “incoherent” to “a word game” that is “permeated with sophistry.” Efforts to understand the standing doctrine through the lens of any particular issue often fail for the same reason that efforts to slay the Hydra failed: after answering one question, two or more questions spring up in its place. Thus, as the Greek heroes and heroines who sought to destroy the Hydra created a worse monster, the Supreme Court’s cases seeking to clarify the standing doctrine often create more questions than they actually answer.<sup>7</sup>

To minimize the risk of confusion, it is useful to distinguish between the types of standing, their respective purposes, and how these purposes are balanced against other considerations.

### 1. Article III Standing and the Judicial Role

The judicial power is limited under Article III of the Constitution to consideration of “Cases” or “Controversies.”<sup>8</sup> Of course, this limit is a critical component of the tripartite system and a necessary element of any case or proceeding; it may not be waived by the parties or the court.<sup>9</sup> As now-Chief Justice Roberts once noted:

[I]t may be worthwhile to recall that the Supreme Court for some time has recognized standing as a constitutionally based doctrine designed to implement the Framers’ concept of the proper—and properly limited—role of the courts in a democratic society. The legitimacy of an unelected, life-tenured judiciary in our democratic republic is bolstered by the constitutional limitation of that judiciary’s power in Article III to actual “cases” and “controversies.” The need

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<sup>7</sup>Matthew R. Schulz, Recent Case, *Bennett v. Spear*, 26 *ECOLOGY L.Q.* 683, 683 (1999) (citations omitted).

<sup>8</sup>U.S. CONST. art. III, § 2; *see also* *Muskrat v. United States*, 219 U.S. 346, 355–56 (1911) (discussing the case or controversy requirement).

<sup>9</sup>*Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

to resolve such an actual case or controversy provides the justification not only for judicial review over the popularly elected and accountable branches of the federal government, but also for the exercise of judicial power itself, which can so profoundly affect the lives, liberty, and property of those to whom it extends. This is nothing new; the Court explained a century ago that the exercise of federal judicial power was legitimate only as a necessity in the determination of real, earnest, and vital controversy.<sup>10</sup>

Consistent with this purpose, Article III standing requires an “injury in fact,” an actual or imminent invasion of a legally protected interest, as a result of the challenged action that will likely be redressed by a favorable decision.<sup>11</sup> The function of the courts is, of course, to adjudicate the case and controversy before them; judicial review is therefore interpretive and tailored to the specific facts of the case. Deciding a dispute without an injury or beyond the scope of the case is not adjudication; it is judicial legislation.

## 2. Statutory Standing and Legislative Design

The term “statutory standing” has been used to refer to variations of prudential standing concepts, such as the “zone of interests” covered by a statute,<sup>12</sup> and as a subset of prudential standing generally.<sup>13</sup> For the sake of clarity, this Article limits the term “statutory standing” to the right to appear and be heard that is authorized by the express terms of the relevant statute. By contrast, the term prudential standing refers only to the judicially-crafted standing requirements that supplement constitutional and statutory standing.<sup>14</sup>

As with constitutional standing, statutory standing is a product of the separation of powers in the federal system—it is based on the power of the legislative branch to determine what to legislate, balance the interests affected by a law, and design the structure for accomplishing its objectives.

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<sup>10</sup> John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1220 (1993) (quotation marks and citations omitted).

<sup>11</sup> *Lujan*, 504 U.S. at 560–61.

<sup>12</sup> *Cf.* Jeffrey M. Goldberg & Assocs. v. Holstein (*In re Holstein*), 299 B.R. 211, 223 (Bankr. N.D. Ill. 2003).

<sup>13</sup> *See In re Godon, Inc.*, 275 B.R. 555, 563–64 (Bankr. E.D. Cal. 2002).

<sup>14</sup> *See infra* Part I.A.3 (discussing prudential standing and the zone of interests test).

A natural application of this authority is fixing who may be heard in court concerning disputes over a statute.<sup>15</sup> These statutory provisions limit the courts' discretion to unilaterally choose who has the right to be heard; the courts do not have the authority to expand standing beyond the limits imposed, or deny standing when it has been expressly granted, by Congress.<sup>16</sup> If the courts interpret standing in a manner contrary to congressional intent, Congress may amend the relevant statute to clarify that intent to ensure that the courts' role in the statutory design functions as Congress intended. But the fact that Congress does not amend a statute in response to judicial legislation should not be read as an endorsement by silence.<sup>17</sup>

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<sup>15</sup> See, e.g., *O'Shea v. Littleton*, 414 U.S. 488, 493 n.2 (1974); *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973). Statutory standing may not, however, exceed the limits of Article III. See *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 487 n.24 (1982) ("Neither the Administrative Procedure Act, nor any other congressional enactment, can lower the threshold requirements of standing under Art. III."); *Roberts*, *supra* note 10, at 1226 ("If Congress directs the federal courts to hear a case in which the requirements of Article III are not met, that Act of Congress is unconstitutional."). Even so, this does not prevent Congress from creating legal rights such that the Article III standing requirement is satisfied. *Roberts* explained:

The Court has recognized that the requisite Article III injury may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing. The Court in *Defenders* explained that its prior cases applying this principle were consistent with the injury in fact requirement, because in those cases the statutes in question elevated injuries that were not previously legally cognizable to the status of legally enforceable rights.

*Id.* at 1228.

<sup>16</sup> See *In re Godon, Inc.*, 275 B.R. at 564; cf. *Leuthner v. Blue Cross & Blue Shield of Ne. Pa.*, 454 F.3d 120, 126 (3d Cir. 2006) (In concluding "that statutory standing requirements in ERISA § 502(a)(1) were essentially a codification of ERISA's 'zone of interest'—we did not mean the inverse, i.e., that prudential standing suffices for statutory standing. Indeed, it would make little sense for Congress to have enacted ERISA § 502(a)(1) to define who may bring suit against a plan administrator if standing to sue were to be determined by the traditional 'zone of interest' prudential standing test."); *In re J.M. Wells, Inc.*, 575 F.2d 329, 331 (1st Cir. 1978).

<sup>17</sup> *United States v. Craft*, 535 U.S. 274, 287 (2002) (noting that "[C]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change" (quoting *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994))); *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001) ("And when, as here, Congress has not comprehensively revised a statutory scheme but has made only isolated amendments, we have spoken more bluntly: It is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of the



### 3. Judicial Self-Governance and Prudential Standing

Prudential standing “is founded in concern about the proper—and properly limited—role of the courts in a democratic society”<sup>18</sup> and guide the determination of whether a party “is a proper party to invoke judicial resolution of the dispute and the exercise of the court’s remedial powers.”<sup>19</sup> Although the considerations may overlap, prudential standing should not be confused with statutory interpretation or Article III standing. Statutory interpretation focuses on the meaning of the statutory language, and Article III standing concerns the existence of an injury in fact. Prudential standing takes these concepts one step further: even if not a direct extension of the statutory language or intent, courts evaluate basic questions about the party advancing the question, the nature of the rights in question, and the underlying purposes of the relevant statutory provisions within the context of the separation of powers principle. Thus, the common prudential standing considerations—“the general prohibition on a litigant’s raising

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Court’s statutory interpretation.” (quotation marks and citations omitted)); *Sale v. Haitian Ctrs. Council*, 509 U.S. 155, 168 n.16 (1993) (“The government’s reading would require us to rewrite § 243(h)(1) into its pre-1980 status, but we may not add terms or provisions where congress has omitted them, and this restraint is even more compelling when congress has specifically removed a term from a statute” (quotation marks and citations omitted)); *Ark. Best Corp. v. Comm’r*, 485 U.S. 212, 222 n.7 (1988) (although 25 years passed since statute was first interpreted a particular way “without any sign of disfavor from Congress,” inaction was not sufficient to overcome the statutory language); *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 442–43 (1987) (“Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.” (quoting *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 392–93 (1980) (Stewart, J., dissenting))); *Zuber v. Allen*, 396 U.S. 168, 185 n. 21 (1969) (“The verdict of quiescent years cannot be invoked to baptize a statutory gloss that is otherwise impermissible. . . . Congressional inaction frequently betokens unawareness, preoccupation, or paralysis”); *Helvering v. Hallock*, 309 U.S. 106, 121 (1940) (Frankfurter, J.) (“[W]e walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle.”); see also *Nw. Envtl. Advocates v. U.S. E.P.A.*, No. 03-05760 SI, 2005 WL 756614, at \*9–13 (N.D. Cal. Mar. 30, 2005) (EPA interpretation applied for thirty years without congressional action did not establish congressional acceptance of the interpretation).

<sup>18</sup>*E.g.*, *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (prudential standards serve as rules of judicial self-restraint that compliment constitutional standing limits on the exercise of judicial power in the federal system).

<sup>19</sup>*Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 546 n.8 (1986) (citing *Warth*, 422 U.S. at 518); accord *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 939 (9th Cir. 2005) (“The prudential standing analysis examines whether a particular plaintiff has been granted a right to sue by the statute under which he or she brings suit.” (citing *City of Sausalito v. O’Neill*, 386 F.3d 1186, 1199 (9th Cir. 2004))).

another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked"<sup>20</sup>—all limit standing in ways that, directly or indirectly, compliment the principle.<sup>21</sup>

Prudential standing is thus considered a doctrine of judicial self-restraint, which, in this context, refers to avoiding judicial actions that intrude into the legislative or executive spheres.<sup>22</sup> This is admittedly a difficult line to draw in many cases.<sup>23</sup> While it often means restraint from deciding matters unless necessary, the basis for restraint—respecting the separation of powers of our federal system—may be better served by refusing to employ judicially-crafted limits that exclude parties contemplated by the language of the statute.<sup>24</sup> As Justice Frankfurter noted,

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<sup>20</sup> *Allen v. Wright*, 468 U.S. 737, 751 (1984); *accord In re A.P.I. Inc.*, 331 B.R. 828, 858 (Bankr. D. Minn. 2005) (applying three-prong test of *Warth v. Seldin*); *Sentinel Trust Co. v. Newcare Health Corp. (In re Newcare Health Corp.)*, 244 B.R. 167, 171 (B.A.P. 1st Cir. 2000) (citing general prudential standing requirements).

<sup>21</sup> *See Barrows v. Jackson*, 346 U.S. 249, 255 (1953).

<sup>22</sup> Of course, the fact that judicial statutory interpretations may alter the understanding of a law does not render the statutory construction a legislative activity. *See Japan Whaling Ass'n v. Am. Cetacean Soc.*, 478 U.S. 221, 230 (1986) (“[U]nder the Constitution, one of the Judiciary’s characteristic roles is to interpret statutes.”); *Nw. Airlines, Inc. v. Transp. Workers Union of Am.*, 451 U.S. 77, 95 & n.34 (1981) (“[T]he federal lawmaking power is vested in the legislative, not the judicial, branch of government”; once the legislature speaks, “the task of the federal courts is to interpret and apply statutory law.”).

<sup>23</sup> *See LC & S, Inc. v. Warren County Area Plan Comm’n*, 244 F.3d 601, 603 (7th Cir. 2001) (“[T]he line between legislation and adjudication is not always easy to draw”); *United States v. Koyomejian*, 970 F.2d 536, 544 (9th Cir. 1992) (Kozinski, J., concurring). However, the judicial imposition of a distinct statutory process from another statute arguably suggests that the function in question is legislative, not judicial. As Judge Kozinski argued in *Koyomejian*, “[B]y anybody’s definition, what the court does today falls in the realm of legislation. Any doubt on this score is surely removed by the court’s explicit and conscious adoption of its requirements from Title I. If this is adjudication, I am a fish.” *Id.*

<sup>24</sup> *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002) (courts could not adopt a heightened pleading requirement for employment discrimination claims); *Crawford-El v. Britton*, 523 U.S. 574, 594 (1998) (concluding that a judicially-crafted “special [pleading] rule for constitutional claims that require proof of improper intent . . . would stray far from the traditional limits on judicial authority”); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168–69 (1993) (holding that court was not permitted to impose judicially-crafted heightened pleading requirements in civil rights cases); *Educadores Puertorriqueños en Acción v. Hernández*, 367 F.3d 61, 66 (1st Cir. 2004) (“[F]ederal courts should refrain from crafting heightened pleading standards, regardless of the special circumstances those standards are intended to address.”); *GNB Battery Techs, Inc. v. Gould, Inc.*, 65 F.3d 615, 620–

"[T]he only sure safeguard against crossing the line between adjudication and legislation is an alert recognition of the necessity not to cross it and instinctive, as well as trained, reluctance to do so."<sup>25</sup>

Confusion often arises, however, when discussions of prudential standing focus on its role in promoting judicial efficiency and convenience. To be certain, prudential standing plays an important role in judicial self-management. But this function cannot be viewed in isolation; steps taken to improve judicial efficiency and convenience must be consistent with the statutory design. Although the Supreme Court has, at times, referred to prudential standing as a tool of judicial convenience in distinguishing prudential and other forms of standing,<sup>26</sup> it has not condoned the exclusion of parties for judicial convenience alone.

### *B. Bankruptcy Standing Today*

The reach of federal bankruptcy power is such that standing considerations are often more complex in bankruptcy cases and proceedings<sup>27</sup> than in other litigation.<sup>28</sup> Bankruptcy operates not only to resolve individual disputes in isolation—a context in which the impact of an order on a specific party's interests and rights is much less difficult to ascertain—but also to balance the respective rights of parties in interest in the case as a whole as provided by statute.<sup>29</sup> An order concerning a discrete

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21 (7th Cir. 1995) (denying judicial authority to impose heightened pleading requirements to minimize litigation where a municipal immunity defense was likely); *Brader v. Allegheny Gen. Hosp.*, 64 F.3d 869, 876–77 (3d Cir. 1995) (rejecting heightened pleading requirement in antitrust case).

<sup>25</sup> Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 535 (1947).

<sup>26</sup> *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 557 (1996).

<sup>27</sup> The bankruptcy case may be seen as "the basis for taking control of all pertinent interests in property, dealing with that property, determining entitlements to distributions, the procedures for administering the mechanism, and discharging the debtor." *Menk v. Lapaglia (In re Menk)*, 241 B.R. 896, 908 (B.A.P. 9th Cir. 1999). By contrast, a "proceeding" refers to an isolated matter within the bankruptcy case. *Bank United v. Manley*, 273 B.R. 229, 235 (N.D. Ala. 2001) ("A title 11 case is the umbrella under which all of the proceedings that follow the filing of a bankruptcy petition take place." (quotation marks and citation omitted)).

<sup>28</sup> See *Kowal v. Malkemus (In re Thompson)*, 965 F.2d 1136, 1141 (1st Cir. 1992).

<sup>29</sup> As Collier notes:

[B]ankruptcy litigation in many instances is unlike ordinary civil litigation. In a typical civil case, there is a plaintiff and a defendant, one of which loses at the trial level. It is

proceeding may have a substantive impact on the bankruptcy case and, directly or as a result of the order's impact on the case as a whole, the interests of several distinct parties.<sup>30</sup> Any resulting injury, financial or not, may constitute an "injury in fact" for Article III purposes regardless of whether it stems from the outcome of the proceeding in isolation or due to its impact on the entire bankruptcy case.<sup>31</sup> Furthermore, these injuries may be redressed in many instances with affirmative relief authorized under the Code or by blocking the entry of (or, on appeal, reversal of an order granting) relief requested by another party. In short, a large number of parties may satisfy Article III standing requirements in a single bankruptcy dispute.

Bankruptcy standing is not, however, without limits; far from it. Many provisions of the Code expressly limit the right to bring actions or otherwise be heard to specific parties. Moreover, courts may employ general prudential standing tests that further limit the parties that are entitled to be heard.<sup>32</sup> The constitutionality of statutory barriers is rarely in question, but prudential standing tests often raise questions about the appropriate balancing of interests and the extent to which courts may limit access to their courtrooms without legislating from the bench.

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therefore unnecessary to set strict standards regarding standing on appeal because the person appealing is the party to the action who lost below. On the other hand, bankruptcy litigation frequently involves and affects the interest of entities that are not formally parties to a particular adversary proceeding or contested matter.

1 COLLIER ON BANKRUPTCY ¶ 5.06 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. 2007).

<sup>30</sup> Issues decided in the context of a bankruptcy case regularly have considerable unintended or unanticipated collateral consequences that may not be reversible. See *Tilley v. Vucurevich* (*In re Pecan Groves of Ariz.*), 951 F.2d 242, 245 (9th Cir. 1991) ("Bankruptcy litigation . . . almost always implicates the interests of persons who are not formally parties to the litigation.").

<sup>31</sup> See *Duckor Spradling & Metzger v. Baum Trust* (*In re P.R.T.C, Inc.*), 177 F.3d 774, 777 (9th Cir. 1999); *Kane v. Johns-Manville Corp.* (*In re Johns-Manville Corp.*), 843 F.2d 636, 642 n.2 (2d Cir. 1988).

<sup>32</sup> See *infra* Part III.

## 1. Standing in Bankruptcy Court

### *a. Party in Interest Standing*

In many situations, specific provisions of the Code extend the right to be heard to “parties in interest,”<sup>33</sup> and, unless otherwise specified,<sup>34</sup> section 1109(a) authorizes parties in interest to participate:

A party in interest, including the debtor, the trustee, a creditors’ committee, an equity security holders’ committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue in a case under this chapter.<sup>35</sup>

Although section 1109(a) expressly notes that “party in interest” includes the parties listed,<sup>36</sup> the term is not limited to those parties<sup>37</sup> and is not otherwise defined in the Code.

In the absence of a statutory definition, it is useful to understand how the term was applied under the Bankruptcy Act.<sup>38</sup> Indeed, although the

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<sup>33</sup> 11 U.S.C. § 330(a)(2) (2007) (professional compensation); *id.* § 362(c)(3)(B) (extend automatic stay); *id.* § 362(d) (lift stay); *id.* § 502(a) (claim objections); *id.* § 554(b) (abandon property); *id.* § 706(b) (convert case); *id.* § 707(b)(1) (convert or dismiss case); *id.* § 1104(a), (c) (appoint trustee or examiner); *id.* § 1112(b) (dismiss case); *id.* § 1121(c), (d) (file plan and request modification to exclusive period to file plan); *id.* § 1128(b) (plan confirmation); *id.* § 1144 (revoke confirmation); *id.* § 1174 (railroad liquidation); *id.* § 1204 (remove or reinstate debtor in possession); *id.* § 1208(c), (d) (dismiss or convert case); *id.* § 1224 (plan confirmation); *id.* § 1228(d) (revoke discharge); *id.* § 1230(a) (revoke confirmation); *id.* § 1307(c) (convert or dismiss case); *id.* § 1328(e) (revoke discharge); *id.* § 1330(a) (revoke confirmation).

<sup>34</sup> See *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 8 (2000) (“[W]e do not read § 1109(b)’s general provision of a right to be heard as broadly allowing a creditor to pursue substantive remedies that other Code provisions make available only to other specific parties.”). Although the provision at issue in *Hartford Underwriters* allows only the trustee to initiate a specific proceeding, the opinion does not foreclose the possibility that a party in interest may have standing to challenge the trustee’s action.

<sup>35</sup> 11 U.S.C. § 1109(b) (2007). Although Chapter 7 does not include a comparable provision, parties in interest generally have the same right to appear and be heard in Chapter 7 as they do in Chapter 11. *LeBlanc v. Salem (In re Mailman Steam Carpet Cleaning Corp.)*, 196 F.3d 1, 5 (1st Cir. 1999) (noting that “Chapter 7 includes no comparable provision, but in practice bankruptcy courts routinely entertain adversary proceedings against the Chapter 7 trustees. In light of the structure and purposes of the Code, we agree with these courts that the right to be heard applies in the liquidation context.” (citations omitted)).

<sup>36</sup> In addition, the recently-enacted section 1512 of the Code provides foreign representatives with the right to “participate as a party in interest.” 11 U.S.C. § 1512 (2007).

<sup>37</sup> See *id.* § 102(3) (“‘includes’ and ‘including’ are not limiting”).

Bankruptcy Act extended limited participation rights to “parties in interest” without defining the term,<sup>39</sup> its application was informed by the principle that Congress legislates against its understanding of prior bankruptcy law.<sup>40</sup> As one court explained:

The use . . . of the words “parties in interest” instead of the word “creditors” was, of course, intentional, and, as it is presumed the legislators who framed the act of 1898 had some familiarity with the act of 1867, it is fair to assume that they intended to make the act of 1898 broader than that of 1867[.]<sup>41</sup>

The need to establish a pecuniary interest depended on the nature of the issue under consideration.<sup>42</sup> Consistent with this understanding, courts

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<sup>38</sup> When a term is not defined under the Code, courts look to the contemporary understanding of the term at the time the law was enacted. *United States v. Schilling* (*In re Big Rivers Elec. Corp.*), 355 F.3d 415, 432–33 (6th Cir. 2004) (discussing the Congressional inclusion of terms from existing law when drafting the Bankruptcy Act and Bankruptcy Code); *Wright v. Bujnowski* (*In re Wright*), 209 B.R. 276, 279 (E.D.N.Y. 1997) (referencing legislative history and the understanding of “willful and malicious” under the Bankruptcy Act to discern its meaning under the Code); *accord* *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981) (“Where Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.”); *Perrin v. United States*, 444 U.S. 37, 42 (1979) (“A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.” (citing *Burns v. Alcala*, 420 U.S. 575, 580–81 (1975))). In the absence of a change in the statutory design or other clear expression of intent to change pre-Code law, the pre-Code understanding will generally guide the application of current law. *Dewsnup v. Timm*, 502 U.S. 410, 419 (1992) (noting that Congress does “not write on a clean slate” when it modifies bankruptcy law).

<sup>39</sup> *In re Imperial ‘400’ Nat’l, Inc.*, 431 F. Supp. 155, 168 (D.N.J. 1977) (discussing the meaning of “parties in interest” under the Bankruptcy Act).

<sup>40</sup> *In re Levey*, 133 F. 572, 574–75 (N.D.N.Y. 1904).

<sup>41</sup> *Id.* at 574.

<sup>42</sup> *In re Feuer*, 4 F.2d 892, 893 (2d Cir. 1925) (Creditor was a party in interest even though it did not have a pecuniary interest in the discharge order); *In re Levey*, 133 F. at 575; *In re Imperial ‘400’*, 431 F. Supp. at 168 (refusing to limit the term to creditors and shareholders because any party could simply purchase a right to be heard); *In re Sanders*, 20 F. Supp. 98, 99 (N.D. Ga. 1937) (“One who is hurt or helped by the discharge is a party in interest.”); GILBERT’S COLLIER ON BANKRUPTCY, ¶ 835 (4th Ed. 1937) (Courts interpret parties in interest to include “every party having any interest in or connection with the case”). *But see In re Sully*, 152 F. 619, 620 (2d Cir. 1907) (“The term ‘parties in interest’ applies to those who have an interest in the res which is to be administered and distributed in the proceeding; and does not include those who are merely debtors or alleged debtors of the bankrupt.”); FRANK O. LOVELAND, A TREATISE ON THE

have generally concluded that the term should be interpreted broadly under the Code and may extend to those without a pecuniary interest.<sup>43</sup>

Party in interest standing is not static across all proceedings within a bankruptcy case—status as a party in interest with respect to some proceedings does not necessarily bestow the same status with respect to other proceedings. Indeed, the legislative history expressly notes that the definition of the term depends on the context of the dispute; a party is not a party in interest with respect to a specific matter unless they have a sufficient interest in that matter.<sup>44</sup> This interest may, however, arise as a result of the significance of the issue to the party's rights in the case as a whole. Parties in interest have certain basic rights in the administration and substantive developments in the case. Actions that forever alter a party's rights in the case as a whole—even when the loss of those rights may not alter the party's non-bankruptcy rights in the absence of some future event—nonetheless give rise to an injury in fact; it cannot be seriously questioned that the loss of the protections afforded by the Bankruptcy Code qualifies as an injury. The preservation of these rights, then, is distinct and personal, not a mere "generalized interest" in a case or proceeding.

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LAW AND PROCEDURE IN BANKRUPTCY § 275 (3d ed., The W.H. Anderson Co. 1907) (concluding that a pecuniary interest was required to qualify as a party in interest entitled to object to discharge).

<sup>43</sup> See *In re Amatex Corp.*, 755 F.2d 1034, 1042 (3d Cir. 1985); *Ault v. Emblem Corp.* (*In re Wolf Creek Valley Metro. Dist. No. IV*), 138 B.R. 610, 615 (D. Colo. 1992); *In re River Bend-Oxford Assocs.*, 114 B.R. 111, 116 (Bankr. D. Md. 1990) ("[T]he concept of party in interest under the Bankruptcy Code for purposes of participation in the reorganization process should be interpreted flexibly to insure fair representation of all significantly impacted constituencies."); *In re Johns-Manville Corp.*, 36 B.R. 743, 754 (Bankr. S.D.N.Y. 1984) ("The concept of 'party in interest' is an elastic and broad one designed to give the Court great latitude to insure fair representation of all constituencies impacted in any significant way by a Chapter 11 case."), *aff'd*, 52 B.R. 940 (S.D.N.Y. 1985).

<sup>44</sup> See *In re River Bend-Oxford Assoc.*, 114 B.R. at 113 (noting that absence of a statutory definition of "party in interest" was intentional and its meaning depends on the particular purposes of the provision in question and factual context in which it is applied) (citing 124 CONG. REC. S17, 407 (daily ed. Oct. 6, 1978)); cf. *Bennett v. Spear*, 520 U.S. 154, 175–76 (1997) ("Whether a plaintiff's interest is 'arguably . . . protected . . . by the statute' within the meaning of the zone-of-interests test is to be determined not by reference to the overall purpose of the Act in question (here, species preservation), but by reference to the particular provision of law upon which the plaintiff relies.").

b. *Prudential Standing in Bankruptcy Court*

The general prudential standing principles that are most often applied in bankruptcy court overlap with, and reinforce, the “party in interest” focus on the specific provisions at issue. For example, the zone of interests test is commonly employed to discern whether a party’s interests are protected<sup>45</sup> and exclude parties hoping to obtain a potential windfall from the operation of Code provisions that are designed for the sole benefit of other parties.<sup>46</sup> Standing in these circumstances does not advance the statutory purpose and may lead to abuse of the bankruptcy process.<sup>47</sup> For much the same reason, bankruptcy standing often hinges on whether the interest that the party is asserting is their own or that of another party.<sup>48</sup> Thus, notwithstanding the expansive reach of party in interest standing, the specific purposes of the statutory provisions at issue commonly provide common sense limits on this standing.

Other provisions of the Code provide designated parties with standing to appear and be heard on any issue, albeit with specific limitations. For example, section 1109(a) of the Code provides the SEC with sweeping participation rights in bankruptcy court, but it also expressly denies the SEC

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<sup>45</sup> The zone of interests test has been characterized as “the most useful factor in considering Congressional intent on the question of standing” and is often used for that purpose. *Bonds v. Tandy*, 457 F.3d 409, 413 n.7 (5th Cir. 2006) (quoting *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1209 n.5 (5th Cir. 1991)). But this application of the test is not a “prudential standing” inquiry as that term is ordinarily defined; it is simply a means of determining whether a party has statutory standing.

<sup>46</sup> See *In re Harwald Co.*, 497 F.2d 443, 444 (7th Cir. 1974); *In re Caldor, Inc.*, 193 B.R. 182, 186 (Bankr. S.D.N.Y. 1996).

<sup>47</sup> See generally Bradford C. Mank, *Prudential Standing and the Dormant Commerce Clause: Why the “Zone of Interests” Test Should Not Apply to Constitutional Cases*, 48 ARIZ. L. REV. 23 (2006) (discussing whether the zone of interests test should be applied outside of the context of the Administrative Procedure Act). Although its application is not universal, it has been invoked to assist with understanding congressional intent. See *supra* note 45. And the test has been applied by courts interpreting the Code. *Dick’s Clothing & Sporting Goods, Inc. v. Phar-Mor, Inc.*, 212 B.R. 283, 289 (N.D. Ohio 1997) (citing precedent applying the zone of interest test to cases under the Act and the Code).

<sup>48</sup> It is well-settled that a party must assert their own rights in all but very limited circumstances. *Royal Indem. Co. v. Am. Bond & Mortgage Co.*, 289 U.S. 165, 171 (1933); *In re Caldor*, 193 B.R. at 186. Courts are particularly skeptical when the parties whose rights the third party asserts have chosen not to assert their rights themselves. *Travelers Cas. & Sur. v. Corbin (In re First Cincinnati, Inc.)*, 286 B.R. 49, 51 (B.A.P. 6th Cir. 2002).



the ability to initiate an appeal.<sup>49</sup> Section 307 states that the United States trustee “may raise and may appear and be heard on any issue in any case or proceeding under this title but may not file a plan pursuant to section 1121(c) of this title.”<sup>50</sup> Likewise, the Commodities Futures Trading Commission “may raise and may appear and be heard on any issue” in a commodities broker liquidation under Chapter 7.<sup>51</sup>

## 2. The “Person Aggrieved” Test and Appellate Standing in Bankruptcy

Although they have increasingly allowed a broad spectrum of parties to have party in interest standing in bankruptcy court; bankruptcy appellate panels, district courts, and circuit courts have adopted a distinct pecuniary interest test for standing to appeal. Indeed, every circuit court to consider the question of appellate standing under the Code has adopted a pecuniary interest requirement,<sup>52</sup> which is based on the “person aggrieved” test for standing to appeal orders of referees under section 39(c) of the 1898 Act.

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<sup>49</sup> 11 U.S.C. § 1109(a) (2007) (“The Securities and Exchange Commission may raise and may appear and be heard on any issue in a case under this chapter, but the Securities and Exchange Commission may not appeal from any judgment, order, or decree entered in the case.”). In railroad bankruptcy cases, standing is granted to regulatory authorities with the same limitation on appellate standing. *Id.* § 1164 (“The Board, the Department of Transportation, and any State or local commission having regulatory jurisdiction over the debtor may raise and may appear and be heard on any issue in a case under this chapter, but may not appeal from any judgment, order, or decree entered in the case.”). These provisions set the parameters for standing for these parties regardless of whether they may also qualify as parties in interest. *In re Prop. Mgmt. & Inv., Inc.*, 19 B.R. 202, 204 (Bankr. M.D. Fla. 1982). Moreover, the limitations established on the right of these parties to appeal do not extend to parties in interest that are similar to these parties. *Co Petro Mktg. Group, Inc. v. Commodity Futures Trading Comm’n (In re Co Petro Mktg. Group, Inc.)*, 680 F.2d 566, 573 (9th Cir. 1982) (“Having shown itself to be a party in interest . . . the Commission should be entitled to the right of appeal normally enjoyed by such parties. The statutory restriction of § 1109(a) against appeals by the SEC is applicable to the Commission neither in express language nor in spirit.”).

<sup>50</sup> 11 U.S.C. § 307 (2007).

<sup>51</sup> *Id.* § 762.

<sup>52</sup> *Lyndon Prop. Ins. Co. v. Katz*, 196 F.App’x 383, 387 (6th Cir. 2006); *Century Indem. Co. v. Congoleum Corp. (In re Congoleum Corp.)*, 426 F.3d 675, 685 (3d Cir. 2005); *White v. Univision of Va., Inc. (In re Urban Broad. Corp.)*, 401 F.3d 236, 243–44 (4th Cir. 2005); *Gibbs & Bruns, L.L.P. v. Coho Energy, Inc. (In re Coho Energy Inc.)*, 395 F.3d 198, 202 (5th Cir. 2004); *In re Combustion Eng’g, Inc.*, 391 F.3d 190, 214 n.20 (3d Cir. 2004); *Armstrong v. Potter (In re Potter)*, 101 F.App’x 770, 772 (10th Cir. 2004); *Westwood Cmty. Two Ass’n v. Barbee (In re Westwood Cmty. Two Ass’n)*, 293 F.3d 1332, 1335 (11th Cir. 2002); *Harker v. Troutman (In re Troutman Enter., Inc.)*, 286 F.3d 359, 364 (6th Cir. 2002); *In re PWS Holding Corp.*, 228 F.3d

Under the person aggrieved test, bankruptcy appeals are limited to those who are “directly and adversely affected pecuniarily by the order.”<sup>53</sup> Only those with a financial stake<sup>54</sup> in an order—whether by diminishing their property, increasing their burdens, or impairing their rights<sup>55</sup>—may appeal. Most courts have held that this excludes contingent financial injury<sup>56</sup> or a non-pecuniary injury that has an indirect financial impact.<sup>57</sup> Regardless of the design of the provision in question or how substantial a party’s interest may be, the absence of a clear, direct pecuniary injury resulting from an order of the bankruptcy court will frequently bar the party’s appeal.

### III. ARGUMENT

#### A. *The Need for Appellate Review under the Code*

The right to appeal plays a vital role in maintaining public confidence in the judicial process, and “the rights to sue and to defend a suit would lose much of their meaning if losing litigants could not appeal . . . .”<sup>58</sup> This is particularly true in bankruptcy; the impartiality of bankruptcy courts is often called into question, and strict adherence to the statutory design may, at times, be unduly sacrificed to expedite the administration of, or salvage, a

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224, 248–49 (3d Cir. 2000); *Kabro Assocs. Of West Islip, L.L.C. v. Colony Hill Assocs.* (*In re Colony Hill Assocs.*), 111 F.3d 269, 273 (2d Cir. 1997); *GMAC v. Dykes* (*In re Dykes*), 10 F.3d 184, 187 (3d Cir. 1993); *Kane v. Johns-Manville Corp.* (*In re Johns-Manville Corp.*), 843 F.2d 636, 642 (2d Cir. 1988); *Nangle v. Surratt-States* (*In re Nangle*), 288 B.R. 213, 216 (B.A.P. 8th Cir. 2003); *Travelers Cas. & Sur.*, 286 B.R. at 51.

<sup>53</sup> *Fondiller v. Robertson* (*In re Fondiller*), 707 F.2d 441, 443 (9th Cir. 1983).

<sup>54</sup> See *Nangle*, 288 B.R. at 216; *Travelers Cas. & Sur.*, 286 B.R. at 51; *In re Gulf States Steel, Inc.*, 285 B.R. 739, 742 (Bankr. N.D. Ala. 2002).

<sup>55</sup> See *Lyndon Prop. Ins.*, 196 F.App’x at 387; *Century Indem. Co.*, 426 F.3d at 685; *In re Combustion Eng’g*, 391 F.3d at 214; *Armstrong*, 101 F.App’x 772; *Westwood Cmty. Two Ass’n*, 293 F.3d at 1335; *In re PWS Holding Corp.*, 228 F.3d at 249; *Dykes*, 10 F.3d at 187.

<sup>56</sup> See *Travelers Ins. Co. v. H.K. Porter Co.*, 45 F.3d 737, 743 (3d Cir. 1995); *Rogers v. Bank of Am. Nat. Trust & Sav. Ass’n*, 142 F.2d 128, 129 (9th Cir. 1944).

<sup>57</sup> *Austin Assocs. v. Howison* (*In re Murphy*), 288 B.R. 1, 5 (D. Me. 2002); *Menk v. Lapaglia* (*In re Menk*), 241 B.R. 896, 917 (B.A.P. 9th Cir. 1999); *Land-O-Sun Dairies, Inc. v. Pine State Creamery Co.*, 200 B.R. 125, 127 (E.D.N.C. 1996). But see *Am. Nuclear Insurers v. Babcock & Wilcox Co.*, No. CIV.A. 01-2751, 2002 WL 1334882, at \*3 (E.D. La. June 14, 2002).

<sup>58</sup> Joan Steinman, *Shining a Light in a Dim Corner: Standing to Appeal and the Right to Defend a Judgment in the Federal Courts*, 38 GA. L. REV. 813, 849–50 (2003-04); cf. Douglas G. Baird & Robert K. Rasmussen, *Beyond Recidivism*, 54 BUFF. L. REV. 343, 363 (2006) (citing the role of “effective oversight from the appellate courts” to check bankruptcy court orders from “get[ting] out of hand”).

case.<sup>59</sup> Historically, public confidence has been critical to the success or failure of federal bankruptcy law.<sup>60</sup> And, politics aside, the bankruptcy courts' perceived bias toward reorganization and expediency played a significant part in the decision to roll back judicial discretion in the 2005 Amendments.<sup>61</sup>

The structure of the judicial process generally also evinces congressional recognition of the importance of bankruptcy appeals.<sup>62</sup> The recent addition of a process for direct appeal from bankruptcy court to federal circuit courts, for example, highlights the importance of appellate review to the bankruptcy process.<sup>63</sup> This process is designed to promote the consistent application of the substantive provisions of the Code by

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<sup>59</sup>LYNN M. LOPUCKI, *COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS* 137–81 (The University of Michigan Press 2005) (citing examples); accord Christopher W. Frost, *The Theory, Reality and Pragmatism of Corporate Governance in Bankruptcy Reorganizations*, 72 AM. BANKR. L.J. 103, 132–33 (1998) (“To the extent bankruptcy courts use judicial case management to substitute their judgment for that of the interested parties, they may step beyond the bounds of impartial decision maker and into the role of active participant in the case.”); see also Arturo Bris, Alan Schwartz, & Ivo Welch, *Who Should Pay for Bankruptcy Costs?*, 34 J. LEGAL STUD. 295, 329 (2005) (asserting that bankruptcy courts have a “continuation bias”); George G. Triantis, *Financial Slack Policy and the Laws of Secured Transactions*, 29 J. LEGAL STUD. 35, 46 n.40 (2000) (referencing a “pro-continuance bias of bankruptcy courts”); Charles J. Tabb, *A Critical Reappraisal of Cross-Collateralization in Bankruptcy*, 60 S. CAL. L. REV. 109, 171 (1986–87) (arguing that “bankruptcy courts have a strong bias in favor of attempting the reorganization”). But see Robert D. Martin, *Comments*, 54 BUFF. L. REV. 503, 504–05 (2006) (agreeing with Professor LoPucki that “decisions have been made which are not well founded in law and which are beneficial to debtors” and that “the bankruptcy law now practiced in large Chapter 11 cases bears little relationship to the statutory text” but questioning the emphasis on bankruptcy judges’ responsibility for these developments).

<sup>60</sup>See generally Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5 (1995) (discussing development of English and American bankruptcy law).

<sup>61</sup>Karen Cordry & Zachary Mosner, *Challenging the “Lake Wobegon Syndrome”: What Hath Congress Wrought with KERPs?*, 25 AM. BANKR. INST. J. 12, 60 (June 2006) (noting that many of the 2005 Amendments “display a substantial distrust of judicial discretion”); Henry J. Sommer, *Trying to Make Sense Out of Nonsense: Representing Consumers Under the “Bankruptcy Abuse Prevention and Consumer Protection Act of 2005”*, 79 AM. BANKR. L.J. 191, 192–93 (2005) (“It is no secret that the bills’ proponents sought to limit the discretion of bankruptcy judges who, according to them, are ‘not real judges.’”).

<sup>62</sup>Steinman, *supra* note 58, at 848–49.

<sup>63</sup>28 U.S.C. § 158(d)(1) (2007). Of course, direct appeals also avoid the delay and expense of first appealing to the district court or bankruptcy appellate panel.

increasing the prospects for review by the federal circuit courts.<sup>64</sup> Consistency, in turn, is viewed as an important part in improving the operation of the bankruptcy system.<sup>65</sup>

Moreover, as the reach of bankruptcy expands, the rationale behind deferring to bankruptcy court expertise becomes less and less compelling. In fact, it has been argued that generalist Article III courts are better suited to balance bankruptcy interests against non-bankruptcy interests fairly.<sup>66</sup> This is not the same as asserting a bankruptcy bias; rather, it is a recognition that courts that specialize in bankruptcy may not be as familiar with other laws or appreciate their respective significance vis-à-vis bankruptcy.

Thus, substantive appeals not only serve to benefit the appellant; they play a vital role in preserving public confidence in the system, promoting consistency among lower courts, and ensuring that non-bankruptcy law and interests are given proper consideration. Congress has not manifested any intent to subordinate these considerations to some overarching desire to expedite the bankruptcy process, and, to the contrary, the design of the Code suggests that expanded participation of parties in interest was not only intended but also expected for the proper functioning of the Code.<sup>67</sup> Moreover, elevating haste above ensuring satisfaction of the requirements of the Code has been cited as a significant factor in the failure of reorganization cases under the Code.<sup>68</sup>

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<sup>64</sup> H.R. REP. NO. 109-31, pt. 1, at 148 (2005) ("This procedure is intended to be used to settle unresolved questions of law where there is a need to establish clear binding precedent at the court of appeals level, where the matter is one of public importance, where there is a need to resolve conflicting decisions on a question of law, or where an immediate appeal may materially advance the progress of the case or proceeding.").

<sup>65</sup> *Id.* at 373-375 (comments of Rep. Sensenbrenner).

<sup>66</sup> *Cf.* Judith A. McKenna & Elizabeth C. Wiggins, *Alternative Structures for Bankruptcy Appeals*, 76 AM. BANKR. L.J. 625, 683-84 (2002) (arguing against the creation of Article III bankruptcy courts of appeal due to concerns that "judges drawn from the specialized bar will not have nor develop the breadth of vision needed to harmonize bankruptcy law with related areas of federal and state commercial law").

<sup>67</sup> *In re Bell & Beckwith*, 44 B.R. 661, 664 (Bankr. N.D. Ohio 1984) ("Public scrutiny is the means by which the persons for whom the system is to benefit are able to insure its integrity and protect their rights. This policy of open inspection, established in the Bankruptcy Code itself, is fundamental to the operation of the bankruptcy system and is the best means of avoiding any suggestion of impropriety that might or could be raised."); *accord* *Gitto v. Worcester Telegram & Gazette Corp. (In re Gitto Global Corp.)*, 422 F.3d 1, 7 (1st Cir. 2005) (discussing expanded right of access to information in bankruptcy).

<sup>68</sup> *See supra* note 59 LoPucki, at 117; *see also* Lynn M. LoPucki & Joseph W. Doherty, *Why Are Delaware and New York Bankruptcy Reorganizations Failing?*, 55 VAND. L. REV. 1933, 1976

### B. *The Imprudent Application of the Modern Person Aggrieved Test*

The extension of the *statutory* person aggrieved test under 1898 Act is premised on the courts' ability to fashion their own *prudential* standing limits. Although the Code does not expressly bar the adoption of a judicially-imposed pecuniary interest standard,<sup>69</sup> neither the Code nor the legislative history suggests that Congress contemplated the possible judicial extension of the former standard into the current law. In particular, two substantial elements of the current test lack any foundation in the Code,<sup>70</sup> the legislative history, or the traditional understanding of prudential standing: (a) the distinction between bankruptcy court standing and appellate standing; and (b) the nearly universal application of a pecuniary interest requirement. Of course, courts may be tempted to retain familiar practices when addressing a new and unfamiliar law, regardless of whether it has a legal basis.<sup>71</sup> If the test alters a party's substantive rights or interferes with the statutory design,<sup>72</sup> however, its adoption as a prudential standard is not an appropriate exercise of judicial authority.

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(2002) (noting that "speed of reorganization is significantly correlated with both plan failure and refilling" and "[f]aster reorganizations are significantly more likely to fail than slower ones").

<sup>69</sup> Indeed, this absence of an express rejection of the pecuniary interest requirement is a frequent justification for the continued use of the standard. See, e.g., *Westwood Cmty. Two Ass'n v. Barbee* (*In re Westwood Cmty. Two Ass'n*), 293 F.3d 1332, 1334-35 (11th Cir. 2002) ("Our sister circuits have agreed that, although Congress did not define who has standing to appeal in the Bankruptcy Code, no evidence exists that Congress intended to alter the definition set forth in the prior law, the Bankruptcy Act of 1898"). This rationale brings to mind another "common sense" understanding: "[A] long habit of not thinking a thing *wrong*, gives it a superficial appearance of being *right*, and raises at first a formidable outcry in defense of custom." THOMAS PAINE, *COMMON SENSE* xxvii (1776).

<sup>70</sup> See *Gibbs & Bruns, L.L.P. v. Coho Energy, Inc.* (*In re Coho Energy, Inc.*), 395 F.3d 198, 202 (5th Cir. 2004); *In re Combustion Eng'g*, 391 F.3d 190, 214 n.20 (4th Cir. 2005); *Armstrong v. Potter* (*In re Potter*), 101 F.App'x 770, 772 (10th Cir. 2004); *In re Carbide Cutoff, Inc.*, 703 F.2d 259, 264 (7th Cir. 1983); *Nangle v. Surratt-States* (*In re Nangle*), 288 B.R. 213, 216 (B.A.P. 8th Cir. 2003).

<sup>71</sup> For an empirical discussion of this temptation, see Cristoph G. Paulus, *Germany: Lessons to Learn from the Implementation of a New Insolvency Code*, 17 CONN. J. INT'L L. 89, 90 (2001-02) (discussing the preservation of concepts and practices from Germany's old insolvency law under the new German law).

<sup>72</sup> Nathalie D. Martin, *Noneconomic Interests in Bankruptcy: Standing on the Outside Looking In*, 59 OHIO ST. L.J. 429, 450 (1998) ("The other common notion, that standing is limited to persons with pecuniary rights, is entirely inconsistent with existing statutory law."); Ralph E. Avery, *Article III and Title 11: A Constitutional Collision*, 12 BANKR. DEV. J. 397, 447 (1995-96) ("The law of standing articulated in most cases significantly limits other sections of the Code

As an exception to the court's "virtually unflagging"<sup>73</sup> obligation to hear matters within their jurisdiction,<sup>74</sup> care should be taken to ensure that the exception does not swallow the rule or, at least, that it does not become a mere tool of convenience.<sup>75</sup> Prudential criteria must be structured carefully to strike the appropriate balance; overly-broad standards may not provide a sufficient level of judicial self-restraint, while narrow, perfunctory standards risk excluding interests that a law is designed to protect or parties whose involvement is anticipated as part of the statutory design.<sup>76</sup>

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despite the apparent congressional intention to permit the widest possible participation in the reorganization process.”).

<sup>73</sup>U.S. Tr. v. Official Comm. of Equity Sec. Holders (*In re Zenith Elecs. Corp.*), 329 F.3d 338, 347 (3d Cir. 2003) (acknowledging the “virtually unflagging obligation” to exercise its jurisdiction to hear an appeal) (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)); *see also* *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516, 521 (10th Cir. 1979) (“It is a well-settled principle of federal jurisdiction that where a federal court does not have a discretion to accept or reject jurisdiction, if it does not have jurisdiction, it will not take it; but it is ruled, on the other hand, that if it has jurisdiction it must take it.”).

<sup>74</sup>*See* Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 235–36 n.44 (1990) (identifying various exceptions to the obligation to exercise jurisdiction). Exceptions with respect to matters of state law and political questions have also been adopted. *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986) (“The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch.”); *Smith v. Metro. Prop. & Liab. Ins. Co.*, 629 F.2d 757, 759 (2d Cir. 1980) (discussing cases that address federalism concerns as a basis for refusing to exercise jurisdiction over state law matters); *see also* *Harman v. Forssenius*, 380 U.S. 528, 534–37 (1965); *Harrison v. N.A.A.C.P.*, 360 U.S. 167, 177 (1959) (“This principle does not, of course, involve the abdication of federal jurisdiction, but only the postponement of its exercise”) (Harlan, J.); *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188 (1959) (The abstention doctrine, “under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it.”); *R.R. Comm’n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941) (Frankfurter, J.). But these exceptions still do not suggest that courts are at liberty to simply pick and choose which matters within their jurisdiction will be heard. *Hackbart*, 601 F.2d at 522.

<sup>75</sup>Laura A. Smith, *Justiciability and Judicial Discretion: Standing at the Forefront of Judicial Abdication*, 61 GEO. WASH. L. REV. 1548, 1601 (1992-93) (“Critics have often accused courts of manipulating the standing doctrine for the courts’ own objectives—a dislike of the particular plaintiff, underlying political concerns, or the desire for judicial economy. No doubt exists that the courts effectively have used standing to restrict the number of plaintiffs attempting to enter the courthouse door.”) (citing LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 3–13, at 96 (2d ed. 1988) (footnotes omitted)).

<sup>76</sup>Chief Justice Marshall noted nearly two centuries ago:

# 1. The Universal Distinction Between Standing in Bankruptcy Court and Standing on Appeal is Based on a Misreading of the Person Aggrieved Test under the Act

## a. *The Person Aggrieved Test Under the 1898 Act*

Recent decisions and commentary concerning the pecuniary interest standard might lead the casual observer to believe that the person aggrieved test applied to any appeal under the Act.<sup>77</sup> Section 39(c) of the Act, however, limited the right to appeal to the persons aggrieved by a referee's order only:

A person aggrieved by an order of a referee may, within ten days after the entry thereof, or within such extended time as

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It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty. In doing this, on the present occasion, we find this tribunal invested with appellate jurisdiction in *all* cases arising under the constitution and laws of the United States. We find no exception to this grant, and we cannot insert one.

Cohens v. Virginia, 19 U.S. 264, 404 (1821). Although views of federal jurisdiction have changed significantly during the last two centuries, the distinction between the courts' and Congress' respective discretion to avoid consideration of issues remains fundamentally the same. See *infra* notes 136 and 140.

<sup>77</sup>See Gibbs & Bruns LLP v. Coho Energy Inc. (*In re Coho Energy Inc.*), 395 F.3d 198, 202 (5th Cir. 2004); Westwood Cmty. Two Ass'n, v. Barbee (*In re Westwood Cmty. Two Ass'n*), 293 F.3d 1332, 1334–35 (11th Cir. 2002); Harker v. Troutman (*In re Troutman Enters.*), 286 F.3d 359, 364 (6th Cir. 2002); *In re PWS Holding Corp.*, 228 F.3d 224, 248–49 (3d Cir. 2000); Kabro Assocs. of W. Islip v. Colony Hill Assocs. (*In re Colony Hill Assocs.*), 111 F.3d 269, 273 (2d Cir. 1997); Travelers Ins. Co. v. H.K. Porter Co., 45 F.3d 737, 741 (3d Cir.1995); Depoister v. Mary M. Holloway Found., 36 F.3d 582, 585 (7th Cir. 1994); Holmes v. Silver Wings Aviation, Inc., 881 F.2d 939, 940 (10th Cir. 1989); Kane v. Johns-Manville Corp. (*In re Johns-Mansville Corp.*), 843 F.2d 636, 641–42 (2d Cir. 1988); *In re El San Juan Hotel*, 809 F.2d 151, 154 (1st Cir. 1987); Fondiller v. Robertson (*In re Fondiller*), 707 F.2d 441, 442–43 (9th Cir. 1983); COLLIER ON BANKRUPTCY, § 8001.05 (Alan N. Resnick & Henry J. Somme eds., Matthew Bender 15th ed. 2007) (characterizing the pecuniary interest test as “the standard under the superseded Bankruptcy Act”).

the court may for cause shown allow, file with the referee a petition for review of such order by a judge and serve a copy of such petition upon the adverse parties who were represented at the hearing . . . . Upon application of any party in interest, the execution or enforcement of the order complained of may be suspended by the court upon such terms as will protect the rights of all parties in interest.<sup>78</sup>

Appeals to the circuit court or the Supreme Court under the Bankruptcy Act tracked the rules applied to non-bankruptcy matters.<sup>79</sup> Thus, appeals from orders concerning matters that fell outside the jurisdiction of the referee—including most plenary matters<sup>80</sup>—were not subject to the person aggrieved test.<sup>81</sup> Moreover, if the district court withdrew the reference and issued orders in a case, any appeals of those orders were subject to section 24 of the Act, which did not include any sort of pecuniary requirement, not section 39(c).

The distinction between appeals from referee orders and other orders may appear arbitrary. However, escalation of a matter from a referee was more than a simple appeal to a higher authority; it removed the dispute from the streamlined administrative process before a referee to full-scale, time-consuming litigation before a district court sitting in bankruptcy.<sup>82</sup> Thus, viewed in the proper historical and statutory context, the distinction between standing before the referee and standing to appeal was not just some arbitrary statutory decision; it was a component of the administrative

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<sup>78</sup> Chandler Act, ch. 575, § 39(c), 52 Stat. 840, 855 (1938) (repealed 1978). In addition, General Order XXVII, which served the role of modern-day bankruptcy rules during most of the Act's history, provided: "When a bankrupt, creditor, trustee, or other person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefore. . . ."

<sup>79</sup> Chandler Act, ch. 575, § 24(a), 52 Stat. 840, 858–59. If the judgment, order, or decree involved less than \$500, the appeal could be "taken only upon allowance of the appellate court." *Id.* § 25(a), 52 Stat. 840, 855.

<sup>80</sup> See *Weidhorn v. Levy*, 253 U.S. 268, 273–74 (1920); *Matthews v. United Methodist Church (In re Pac. Homes)*, 611 F.2d 1253, 1256 (9th Cir. 1980). Although plenary matters were not properly subject to the jurisdiction of the referee, which was limited to the district court's summary jurisdiction, the referee could hear disputes that were plenary in nature with the consent of all of the parties. *MacDonald v. Plymouth County Trust Co.*, 286 U.S. 263, 266–67 (1932).

<sup>81</sup> Likewise, standing to appear at the trial stage under the Act was not limited by the person aggrieved test.

<sup>82</sup> ELIZABETH LEE THOMPSON, *THE RECONSTRUCTION OF SOUTHERN DEBTORS: BANKRUPTCY AFTER THE CIVIL WAR* 135–36 (Univ. of Ga. Press 2004).



design to promote efficiency and limit the abuses that plagued previous federal bankruptcy laws.<sup>83</sup>

*b. Application of the Person Aggrieved Test Under the Code*

In many ways, the approach to bankruptcy administration today is consistent with the approach under the 1898 Act, but there has been surprisingly little discussion of why Congress may have chosen against adopting a provision similar to section 39(c) when the Code was adopted. One possible reason is that bankruptcy courts were originally intended to possess both summary and plenary jurisdiction,<sup>84</sup> so the adoption of a standard that was designed to limit appeals of summary matters was omitted to preclude its application to plenary matters. Under this view, after the original judicial structure of the Code was found unconstitutional,<sup>85</sup> this omission may have been overlooked when the judicial structure under the Code was revised to its current form.<sup>86</sup> As compelling as this interpretation may be more than twenty years later, it does not find support in the historical record or the cases adopting a pecuniary standard.

Moreover, this rationale does not explain the expansion of the pecuniary test's application to other courts under the Code. For example, contrary to its application under the Act, at least one court has applied the test to an appeal from an order of the district court following its withdrawal of the

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<sup>83</sup> *Id.* (discussing the impact of the perception of high administrative costs and widespread fraud under the 1867 on efforts to pass another bankruptcy law in the 1880s and 1890s); DAVID A. SKEEL, JR., *DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA* 27, 40 (Princeton Univ. Press 2001) (the administrative difficulties with the federal bankruptcy laws of 1800, 1841, and 1867 were a significant reason for the dissatisfaction with the laws; other than balancing debtor and creditor interests, "the most pressing issue in the debates on the 1898 act was costs"); ASA S. HERZOG, *PROCEEDINGS OF SEMINAR FOR NEWLY APPOINTED REFEREES IN BANKRUPTCY* 7-8 (1964) (noting that the "history of bankruptcy is one of complaints about the unnecessarily high costs of administration" and highlighting the repeal of the Bankruptcy Act of 1867 and contemporary moves to repeal the Bankruptcy Act of 1898 due to high administration costs).

<sup>84</sup> *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 53-55 (1982) (discussing the initial design of the Code).

<sup>85</sup> *Id.* at 87.

<sup>86</sup> *Union Bank v. Wolas*, 502 U.S. 151, 158 (1991) ("The fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning.").

reference from the bankruptcy court.<sup>87</sup> It may be that courts have not considered the distinction between appeals from bankruptcy court orders and other appeals, but this may also suggest that the current distinction is based on some rationale other than that supporting the distinction under the Act.

The absence of any reference to these underlying considerations in reported opinions further suggests that they are not a significant factor in the adoption or expansion of the pecuniary test. Alternatively, the absence of such discussion may reflect an implicit understanding that it is of no moment; the courts are not ordinarily authorized to rewrite a statute: “An omission at the time of enactment, whether careless or calculated, cannot be judicially supplied however much later wisdom may recommend the inclusion.”<sup>88</sup>

## 2. The Pecuniary Test is Inconsistent with the Goals and Purposes of the Code

### *a. The Emphasis on Pecuniary Interests Ignores the Terms of the Code*

The most straightforward reason for the exclusion of the person aggrieved test is one of basic statutory interpretation: it was supplanted by the generally-applicable party-in-interest standard.<sup>89</sup> The substantive and operative provisions of the Code expressly grant broad standing rights to parties in interest generally and other specified parties directly. This right to appear is not limited to proceedings in bankruptcy court by the plain language of the Code.<sup>90</sup> Moreover, courts interpreting the application of

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<sup>87</sup> *In re PWS Holding Corp.*, 228 F.3d 224, 248–49 (3d Cir. 2000) (applying person aggrieved test to appeal from matter heard by district court after withdrawal of the reference of the matter to bankruptcy court).

<sup>88</sup> Frankfurter, *supra* note 25, at 534.

<sup>89</sup> See, e.g., *DirecTV, Inc. v. Brown*, 371 F.3d 814, 817 (11th Cir. 2004) (“[C]hanges in statutory language generally indicate an intent of Congress to change the meaning of the statute.”) (quotation marks, alterations, and citations omitted); *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1444 (D.C. Cir. 1988) (“Where the words of a later statute differ from those of a previous one on the same or related subject, the Congress must have intended them to have a different meaning.”).

<sup>90</sup> Furthermore, Title 28 does not suggest that this distinction is contemplated. See 28 U.S.C.A. § 158 (West 2005).

section 1109(b)<sup>91</sup> or identical language elsewhere in the Code<sup>92</sup> have concluded that there is no basis in the statutory language to distinguish bankruptcy court standing and appellate standing.

This view is further supported by contrasting the Code with the Bankruptcy Review Commission's 1973 report, which expressly proposed the adoption of a standard to replace section 39(c) of the Act.<sup>93</sup> This proposal contemplated a provision limiting bankruptcy standing generally to parties that satisfied the "direct and substantial interest" test of General Order XXVII.<sup>94</sup> Instead, Congress greatly expanded the participation rights<sup>95</sup> of parties in interest—a term that was far less exclusionary than the substantiality test under the Act.

<sup>91</sup> S. Pac. Transp. Co. v. Voluntary Purchasing Groups, Inc., 227 B.R. 788, 792–93 (E.D. Tex. 1998) (interpreting this language to provide an official creditor's committee with standing to appeal as a party in interest).

<sup>92</sup> For example, courts have interpreted 11 U.S.C.A. § 307 (West 2005), which states, in relevant part, "The United States trustee may raise and may appear and be heard on any issue in any case or proceeding[,]" as providing the United States Trustee standing to appeal. Term Loan Holder Comm. v. Ozer Group, L.L.C. (*In re Caldor Corp.*), 303 F.3d 161, 173 (2d Cir. 2002) (concluding that Congress did not intend to give the trustee "significantly greater" intervention rights than "those granted parties in interest by virtually identical statutory language"); United States Tr. v. Clark (*In re Clark*), 927 F.2d 793, 796 (4th Cir. 1991) (standing based on duty to enforce the bankruptcy laws); Morgenstern v. Revco D.S., Inc. (*In re Revco D.S., Inc.*), 898 F.2d 498, 500 (6th Cir. 1990) (applying public interest standard); Ruskin v. Daimler Chrysler Servs. N. Am., L.L.C. (*In re Adkins*), 307 B.R. 880, 883 (E.D. Mich. 2002).

<sup>93</sup> H.R. DOC. NO. 93-137 (1973) as reprinted in COLLIER ON BANKRUPTCY app. B. pt. 4(c) § 2-205(a) (Alan N. Resnick & Henry J. Somme eds., 15th ed. Rev. 2007). As the Note to this section explained:

Subdivision (a) is new, but it derives from the case law construing the provision in § 39c of the present Act that authorizes any "person aggrieved by an order of a referee" to seek review by a judge. Former General Order XXVII authorized a petition for review of a referee's order to be filed by a bankrupt, creditor, trustee, or other person, but the courts have limited the right to review to a person having a direct and substantial interest in the decision appealed from. The requirement of substantiality of interest *does not impose a financial or pecuniary standard.*

*Id.* app. B. pt. 4(c) § 2-205(a) n.1 (quotation marks and citation omitted) (emphasis added).

<sup>94</sup> *Id.* app. B. pt. 4(c) § 2-205(a) n.1. (citation omitted).

<sup>95</sup> The Act provided far fewer participation rights for parties in interest than the Code does today. These matters were, for the most part, limited to investigation of the debtor. *See, e.g.*, Chandler Act, ch 575, § 14(b), 52 Stat. 840, 850 (1938) (repealed 1978) (debtor examination); *Id.* § 21(k) (discovery and related rights); *Id.* § 39(a)(7) (bring action to preserve evidence). *But see Id.* § 39(c) (seek suspension of order).

Further, the express denial of appellate standing in other Code provisions demonstrates that Congress intended to allow appeals by parties in interest.<sup>96</sup> For example, the section immediately preceding 1109(b), which grants broad standing rights to parties in interest without distinguishing between standing in bankruptcy and standing on appeal, provides that the SEC “may raise and may appear and be heard on any issue in a case under this chapter, but . . . may not appeal from any judgment, order, or decree entered in the case.”<sup>97</sup> Section 1164 confers identical standing rights and limitations on the Department of Transportation and other regulators in railroad reorganizations.<sup>98</sup> Particularly telling is the fact that section 762 of the Code grants the SEC the same right to appear in stockbroker liquidation cases, but it does *not* contain a similar limitation on SEC appellate standing.<sup>99</sup> These provisions not only demonstrate that Congress knew how to provide broad standing rights in bankruptcy while limiting those rights on appeal or in other circumstances, but they also show that Congress would expressly do so when such a restriction was part of the statutory design.

*b. The Pecuniary Test Ignores the Expanded Scope of Interests Contemplated By the Current Statutory Design*

Another possible explanation for the omission of a provision comparable to section 39(c) of the Act may be found in the remaining

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<sup>96</sup> A fundamental principle of statutory interpretation is “[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acted intentionally and purposely in the disparate inclusion or exclusion.” *Duncan v. Walker*, 533 U.S. 167, 173 (2001) (quoting *Bates v. United States*, 522 U.S. 23, 29–30 (1997) (alteration in original)); see *Gildon v. Bowen*, 384 F.3d 883, 886 (7th Cir. 2004); *Revco*, 898 F.2d at 500; *S. Pac. Trans. Co.*, 227 B.R. at 793; accord *In re Hardacre*, 338 B.R. 718, 723 (Bankr. N.D. Tex. 2006) (“While Congress could have used the phrase ‘disposable income’ in section 1325(b)(1)(B) and thereby invoked its definition as set forth in section 1325(b)(2), it chose not to do so. Consequently, Congress must have intended ‘projected disposable income’ to be different than ‘disposable income.’”).

<sup>97</sup> 11 U.S.C.A. § 1109(a) (West 2005); see also *supra* note 49.

<sup>98</sup> 11 U.S.C.A. § 1164 (“The Board, the Department of Transportation, and any State or local commission having regulatory jurisdiction over the debtor may raise and may appear and be heard on any issue in a case under this chapter, but may not appeal from any judgment, order, or decree entered in the case.”).

<sup>99</sup> *Id.* § 762(b) (“The [Securities and Exchange] Commission may raise and may appear and be heard on any issue in a case under this chapter.”).

differences between the referee under the Act and bankruptcy court under the Code.<sup>100</sup> Even after the 1984 amendments to the Code, it authorizes broader bankruptcy court jurisdiction and addresses more substantive rights (and, in many cases, with greater detail) than the Act.<sup>101</sup> Many provisions of the Code are designed for the primary purpose of serving decidedly non-pecuniary interests or, at least, to elevate non-pecuniary interests over purely pecuniary interests.<sup>102</sup> The 2005 amendments to the Code, for example, require the appointment of consumer privacy or patient care ombudsmen, as appropriate, to protect consumer privacy and the quality of patient care, respectively.<sup>103</sup> In addition, Congress amended the Code to address non-monetary defaults under a lease going forward,<sup>104</sup> and crime victims are authorized to request the dismissal of a voluntary case of the perpetrator of the crime, which will be granted when it is “in the best interest of the *victim* . . . .”<sup>105</sup> Finally, many provisions of the Code play

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<sup>100</sup> Cf. *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1445 (D.C. Cir. 1988) (“It would be absurd to hold that isolated portions of the Curtis Act and the Creek Agreement survive even though the statutory context in which they appeared—allotment and assimilation—has been stripped away by the OIWA.”).

<sup>101</sup> Howard C. Buschman III & Sean P. Madden, *The Power and Propriety of Bankruptcy Court Intervention in Actions Between Nondebtors*, 47 BUS. LAW. 913, 916 (1992) (discussing the narrow jurisdiction of the referee under the Act and the expansion of bankruptcy court jurisdiction under the Code); see also FED. R. BANKR. P. 7004(f); *Warfield v. KR Entm't, Inc.* (*In re Fed. Fountain, Inc.*), 165 F.3d 600, 601 (8th Cir. 1999) (en banc); *Owens-Ill., Inc. v. Rapid Am. Corp.* (*In re Celotex Corp.*), 124 F.3d 619, 629–31 (4th Cir. 1997) (discussing personal jurisdiction under Code and Bankruptcy Rule 7004); *Diamond Mortgage Corp. of Ill. v. Sugar*, 913 F.2d 1233, 1244 (7th Cir. 1990); *Chem. Bank v. Grisby's World of Carpet, Inc.* (*In re WWG Indus., Inc.*), 44 B.R. 287, 289–90 (N.D. Ga. 1984) (discussing ancillary personal jurisdiction under the Code); *In re Thomas*, 315 B.R. 697, 704–06 (Bankr. N.D. Ohio 2004) (nationwide personal jurisdiction over bankruptcy petition preparers).

<sup>102</sup> 11 U.S.C.A. § 107 (balancing public disclosure and privacy interests); *Id.* § 112 (protection of minors); *Id.* § 362(b) (excepting specified criminal, enforcement and other litigation concerning public interest concerns from the automatic stay); *Id.* § 365(c)(1) (barring nonconsensual assignment of personal service and certain other contracts); *Id.* § 504 (fee sharing); *Id.* § 523 (various exceptions to discharge based on public policy concerns); *Id.* § 525 (protection against pecuniary and non-pecuniary discrimination against debtors); see also Richard F. Broude et al., *The Judge's Role in Insolvency Proceedings: The View from the Bench; The View from the Bar*, 10 AM. BANKR. INST. L. REV. 511, 522 (2002) (noting the broad range of social issues addressed in bankruptcy).

<sup>103</sup> 11 U.S.C.A. § 332 (consumer privacy); *Id.* § 333 (patient care); see also *id.* § 351 (disposal of patient records); *Id.* § 704(a)(12) (patient transfer in liquidation case).

<sup>104</sup> *Id.* § 365(b)(1)(A).

<sup>105</sup> *Id.* § 707(c)(2) (emphasis added).

multiple roles within the overall system,<sup>106</sup> so even provisions that address pecuniary interests may also play a role in protecting or advancing non-pecuniary interests. In short, even if a single pecuniary goal might have been attributable to the 1898 Act, there is clearly no such single goal behind the Code.<sup>107</sup>

Additionally, a significant administrative goal in enacting the Code was to minimize litigation over jurisdictional issues that plagued the Act,<sup>108</sup> so it is easy to see how provisions that create artificial procedural distinctions could be excluded. Indeed, much like the desire to avoid consideration of substantive disputes led to excessive litigation over the summary/plenary distinction under the Act, the effort to avoid scrutiny of substantive issues today may result in repeated litigation over the standing of parties in interest.<sup>109</sup> This use of prudential standing as a sword rather than a shield

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<sup>106</sup> See *Menk v. Lapaglia & Temecula Ready Mix, Inc. (In re Menk)*, 241 B.R. 896, 914 n.58 (B.A.P. 9th Cir. 1999); accord *Avery*, *supra* note 72, at 440–42 (discussing plan confirmation requirements and circumstances where parties with pecuniary interests ignore non-compliance).

<sup>107</sup> *Martin*, *supra* note 72, at 438–39 (“[T]here is nothing simple about bankruptcy policy or the societal issues to which it must respond. Nor is there one goal in devising a bankruptcy scheme. If there was, many of the current Bankruptcy Code provisions, which address a huge array of societal concerns, would not exist.”); accord *Toibb v. Radloff*, 501 U.S. 157, 163 (1991) (criticizing *amici* argument for assuming “that Congress had a single purpose in enacting Chapter 11”).

<sup>108</sup> *In re Seven Springs Apartments, Phase II*, 33 B.R. 458, 468 (Bankr. N.D. Ga. 1983) (“The elimination of controversies over the appropriate forum and the delays and expense in contesting the existence or absence of summary jurisdiction was one of the major changes wrought by the Reform Act.”); H.R. REP. NO. 95-595, at 46 (1977), as reprinted in 1978 U.S.C.C.A.N. 5963, 6007 (A “comprehensive grant of jurisdiction to the bankruptcy courts over all controversies arising out of any bankruptcy or rehabilitation case would greatly diminish the basis for litigation of jurisdictional issues which consumes so much of the time, money, and energy of the bankruptcy system and those involved in the administration of debtors’ affairs.”); S. REP. No. 595, 95th Cong., 1st Sess. 17 (1978), as reprinted in 1978 U.S.C.C.A.N. 5963, 5803 (“A major impetus underlying this reform legislation has been the need to enlarge the jurisdiction of the bankruptcy court in order to eliminate the serious delays, expense and duplications associated with the current dichotomy between summary and plenary jurisdiction. . . .”); Paul P. Daley & George W. Shuster, Jr., *Bankruptcy Court Jurisdiction*, 3 DEPAUL BUS. & COM. L.J. 383, 386 (2005) (The broad jurisdictional grant to bankruptcy courts “was intended to eliminate the pervasive litigation over jurisdiction that occurred under the Bankruptcy Act of 1898 by creating an independent bankruptcy court possessing broad jurisdictional power over all matters related to a bankruptcy case.”).

<sup>109</sup> See Ronald Barliant et al., *From Free-Fall to Free-For-All: The Rise of Pre-Packaged Asbestos Bankruptcies*, 12 AM. BANKR. INST. L. REV. 441, 468 (2004) (noting how asbestos “pre-pack” plan proponents use standing in conjunction with other activities to avoid judicial scrutiny into potentially collusive deals).

may, in some cases, increase the demand on judicial resources rather than reduce it.<sup>110</sup> Moreover, to the extent that a court engages in a full analysis of the substantive dispute, the time and resources used to consider standing disputes is arguably wasted.

c. *The Translation of Non-Pecuniary Rights into Financial Terms Further Demonstrates the Limitations of the Pecuniary Test*

The inequities and operational problems resulting from the one size fits all approach have occasionally led courts to adopt *ad hoc* exceptions to the standard<sup>111</sup> or simply disregard the test altogether for the purposes of the given case.<sup>112</sup> These judicial responses are not only inconsistently applied; they also highlight the inherent limitations of the current system: The emphasis on the pecuniary or non-pecuniary nature of the interest is arbitrary and fails to address the significance or relevance of the interests with respect to the specific provisions at issue. As one commentator explained:

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<sup>110</sup>This precise rationale has been advanced by courts to authorize interlocutory appeals in bankruptcy. *In re Market Square Inn, Inc.*, 978 F.2d 116, 120 (3d Cir. 1992) ("To avoid the waste of time and resources that might result from viewing discrete portions of the action only after a plan of reorganization is approved, courts have permitted appellate review of orders that in other contexts might be considered interlocutory.") (quotation marks and citations omitted); see also *Murray v. Pan Am. World Airways (In re Pan Am Corp.)*, 16 F.3d 513, 515 (2d Cir. 1994).

<sup>111</sup>*Century Indem. Co. v. Congoleum Corp. (In re Congoleum Corp.)*, 426 F.3d 675, 685 (3d Cir. 2005) (analyzing standing under the pecuniary interest test before determining that standing was justified to preserve the integrity of the process). A similar rationale has also been the basis for recognizing losing bidder standing to contest fraudulent or collusive public sales under 11 U.S.C.A. § 365. *Kabro Assocs. of W. Islip, L.L.C. v. Colony Hill Assocs. (In re Colony Hill Assocs.)*, 111 F.3d 269, 273–74 (2d Cir. 1997); *In re Harwald Co.*, 497 F.2d 443, 444–45 (7th Cir. 1974). In *Congoleum*, the Third Circuit also recognized attorney standing to raise ethical violations. 426 F.3d at 686. In addition, although contingent pecuniary interests are often insufficient, the possibility that an estate may ultimately be solvent is often sufficient to give a Chapter 7 debtor standing. *In re Andreuccetti*, 975 F.2d 413, 417 (7th Cir. 1992) (holding that the debtors had standing to challenge the settlement of the estate's right to sue various entities, debtors had standing to appeal settlement of the estate's right to sue other parties because "[t]he outcome of this litigation could potentially have a huge effect on the liabilities of the [debtors] and could give them a substantial surplus upon emerging from bankruptcy"); *Caldwell v. Armstrong*, 342 F.2d 485, 488 (10th Cir. 1965); *Williams v. Marlar (In re Marlar)*, 252 B.R. 743, 749 (B.A.P. 8th Cir. 2000).

<sup>112</sup>See, e.g., *Duckor Spradling & Metzger v. Baum Trust (In re P.R.T.C., Inc.)*, 177 F.3d 774, 778 (9th Cir. 1999) (noting that the reasoning behind allowing standing to those whose pecuniary interests are affected by an order "applies equally to intangible assets").

A strictly pecuniary approach is certainly tidy, black and white, and easy to apply. Like many rules with these attributes, however, it is arbitrary and incoherent. It grants the right to be heard to those with claims, regardless of size, and leaves those without that type of right with no voice at all.<sup>113</sup>

Thus, in order to preserve their rights, parties are forced to translate their injuries into financial injuries, which may be attenuated or fail to capture the injuries' significance. Some administrative orders, for example, may play a decisive role in a case and how a party's interest will be treated, but the emphasis on pecuniary rights may preclude standing even when the order clearly injures the party's interests.<sup>114</sup> Similarly, workers may not suffer a direct or immediately measurable financial loss due to an action under section 363 that reduces safety at a worksite, but it is difficult to argue that they lack an interest in ensuring that a safe working environment is preserved. Likewise, a landlord may not suffer a direct financial loss when a lessee fails to comply with non-pecuniary lease provisions, but these provisions may be designed to prevent a range of problems and are expressly recognized by section 365 of the Code. Thus, with the continued application of the pecuniary interest test as a general standard, a party and a right expressly identified by the Code would not be recognized for standing purposes on appeal.

Even those legal or practical interests that may be readily calculated in financial terms, such as financial rights or obligations that are contingent on a future event, are often dismissed.<sup>115</sup> This is true even when they would

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<sup>113</sup> Martin, *supra* note 72, at 461; cf. Richard H. Fallon, Jr., *Of Justiciability, Remedies, and Public Law Litigation: Notes on the Jurisprudence of Lyons*, 59 N.Y.U. L. REV. 1, 75 (1984) ("A more complex calculus [for standing in administrative appeals] could be misapplied more easily; it would reduce the capacity of appellate courts to correct summarily all perceived errors by the lower federal courts in nontraditional lawsuits. With all its costs, however, complexity should be preferred to the ossification of judicial forms—especially when those forms may be unsuited to evolving needs of the legal and political culture.").

<sup>114</sup> See, e.g., *OneBeacon Am. Ins. Co. v. A.P.I., Inc.*, No. 06-167(JNE), 2006 WL 1473004, at \*5-6 (D. Minn. May 25, 2006) (concluding that appellant lacked standing to appeal denial of party in interest standing by the bankruptcy court); *Mellon Bank, N.A. v. U.S. Tr. (In re Victory Mkts.)*, No. 95-CV-1619, 1996 WL 365675, at \*3-4 (N.D.N.Y. June 27, 1996) (mem. op.) (applying person aggrieved test to appeal of order denying request for appointment to official committee).

<sup>115</sup> See *Travelers Ins. Co. v. H.K. Porter Co.*, 45 F.3d 737, 743 (3d Cir. 1995); *Rogers v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 142 F.2d 128, 129 (9th Cir. 1944).



have a sufficient pecuniary interest if the contingency already occurred. Under this standard, a party may be denied standing because its financial interest is contingent, even though they may be bound by that order if the contingency occurs while the bankruptcy case is still pending. Thus, by accident or design, a debtor with the ability to influence the timing of a contingency may manipulate this fact for the sole purpose of preventing a party from being heard.<sup>116</sup>

Although the relative balancing of pecuniary and non-pecuniary rights requires far more attention than it can be given in this Article, a clear method of balancing these interests is not required; it is sufficient to recognize that some non-pecuniary interests are not readily reduced to pecuniary terms without improperly minimizing their significance. This fact has been implicitly recognized by the adoption of provisions in the Code that elevate non-pecuniary interests that may not be readily quantifiable above purely financial interests.

### 3. Neither Bankruptcy nor Prudential Principles Authorize the Expansion of a Statutory Standing Requirement from Prior Law

#### *a. The "Pre-Code Practices Doctrine" Does Not Support the Judicial Imposition of the Pecuniary Interest Test*

Historical practice plays a substantial role in guiding our understanding of bankruptcy law today. This recognition, as reflected in the "pre-Code practices doctrine," has not been expressly identified as a basis for the adoption of the pecuniary interest requirement. However, in the absence of a clear explanation of the legal foundation for the standard, we are forced to review potential, but unspoken, rationale for its application. And, among the potential legal justifications, this doctrine appears to be closer to reflecting the stated reasons for the judicial adoption of the current standard than other theories.

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<sup>116</sup>For example, as Judge Barliant notes, the recent wave of asbestos "pre-pack" bankruptcy cases allow the proponents to avoid certain protections of the Code, in part, because the debtors' insurers—whose funds are expected to fund the asbestos trusts formed under the plan—are denied standing; their only pecuniary interests are their contractual obligations under the debtors' policies, which remain contingent on whether the claims fixed and approved by the bankruptcy process are covered by the applicable insurance policies. Barliant, *supra* note 109, at 468.

Regardless of any superficial resemblance to situations in which the pre-Code practices doctrine has been applied, the similarities fade quickly under anything more than a passing glance. First, the pre-Code practices doctrine is one of limited application<sup>117</sup> and is relevant only if a practice was demonstrably widespread under the Act.<sup>118</sup> Even if the person aggrieved test qualifies as a pre-Code practice (as opposed to a pre-Code statutory requirement) for the purposes of this doctrine, the current test is, at most, only partially informed by the pre-Code test: as noted previously, the pecuniary requirement was not universal in scope or applied to appeals other than those from an order of the referee under the Act.<sup>119</sup>

In addition, a practice based on a statutory provision that has no counterpart in the current law is not the sort of historical practice contemplated by this principle.<sup>120</sup> To the contrary, the removal of the old provision from the statute ordinarily suggests that the practice that arose from interpretation of that provision is no longer supported.<sup>121</sup> Courts may not, under the rubric of prudential standing or otherwise, ignore the conscious choice by Congress to omit the person aggrieved standard and impose that standard by judicial fiat.<sup>122</sup> As explained in *Hartford Underwriters*:

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<sup>117</sup> *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 461–62 (1998) (Thomas, J., concurring) (noting the “significant changes in both the substantive and procedural laws of bankruptcy” and opining that it “makes little sense to graft onto the Code concepts that were developed during a quite different era of bankruptcy practice” (quoting *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 240 (1989))).

<sup>118</sup> See *Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1, 10 (citing *Ron Pair Enters.*, 489 U.S. at 246; *Dewsnup v. Timm*, 502 U.S. 410, 418 (1992); *Kelly v. Robinson*, 479 U.S. 36, 46 (1986)).

<sup>119</sup> See *supra* Part II.B.1; *infra* Part II.B.3.b.

<sup>120</sup> *Hartford Underwriters*, 530 U.S. at 11 (past practice is relevant only “to fill in the details of a pre-Code concept that the Code had adopted without elaboration” (emphasis added)). In other contexts, the Supreme Court has held that the plain command of a statute should be given effect “even if doing that will reverse the longstanding practice under the statute and the rule.” *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (citation omitted); see also *Brown v. Gardner*, 513 U.S. 115, 122 (1994) (“[A]ge is no antidote to clear inconsistency with a statute . . .”); Adam J. Levitin, *Toward a Federal Common Law of Bankruptcy: Judicial Lawmaking in a Statutory Regime*, 80 AM. BANKR. L.J. 1, 58–66 (2006) (discussing the “pre-code practices doctrine”); accord *supra* notes 38–41.

<sup>121</sup> See *supra* notes 88 and 96.

<sup>122</sup> See *Iselin v. United States*, 270 U.S. 245, 251 (1926) (“What the government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function.”); *Treva v. Office of Pers. Mgmt.*, 69 F.3d 520, 526 (Fed. Cir. 1995)

[W]hile pre-Code practice informs our understanding of the language of the Code, it cannot overcome that language. It is a tool of construction, *not an extratextual supplement*. We have applied it to the construction of provisions which were subject to interpretation, or contained ambiguity in the text. Where the meaning of the Bankruptcy Code's text is itself clear . . . its operation is unimpeded by contrary . . . prior practice.<sup>123</sup>

This limitation on past practice is reflected in several opinions covering a wide range of matters under the Code.<sup>124</sup>

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("[W]e must enforce the statute as written and are not free to ignore what appears to have been a conscious choice by Congress" to omit particular language); *Blackwell v. Vir. Dep't of Taxation* (*In re Blackwell*), 115 B.R. 86, 88-89 (Bankr. W.D. Va. 1990) ("[C]ourts are not permitted to add words to a statute or to accomplish the same result by judicial interpretation"); *see also* *Midlantic Nat'l Bank v. N.J. Dep't of Env'tl. Prot.*, 474 U.S. 494, 510 (1986) ("We have previously expressed our unwillingness to read into unqualified statutory language exceptions or limitations based upon legislative history unless that legislative history demonstrates with extraordinary clarity that this was indeed the intent of Congress." (Rehnquist, J., dissenting) (citing *Garcia v. United States*, 469 U.S. 70, 75 (1984))).

<sup>123</sup> *Hartford Underwriters*, 530 U.S. at 10 (quotation marks and citations omitted) (ellipses in original) (emphasis added).

<sup>124</sup> *See, e.g.,* *Staiano v. Cain* (*In re Lan Assocs. XI, L.P.*), 192 F.3d 109, 117-18 (3d Cir. 1999) (noting that although trustees were compensated differently for "normal administration" and reorganization under the Act, the Code does not distinguish between the two and, accordingly, the compensation for trustees regardless of type of case); *McCuskey v. Cent. Trailer Servs., Ltd.*, 37 F.3d 1329, 1334 (8th Cir. 1994) (statutory tolling of preference actions under a provision of the Act was not included in the Code; thus, the pre-Code practice with respect to that provision was abolished by Congress and does not provide guidance in interpreting the Code); *D-1 Enters., Inc. v. Commercial State Bank*, 864 F.2d 36, 38-40 (5th Cir. 1989) (noting that the process under the Act may have made some proceedings *res judicata* with respect to separate litigation between the parties, but changes to process under the Code render *res judicata* inapplicable); *Ill.-Cal. Express, Inc. v. Teamsters Nat'l Freight Indus. Negotiating Comm.* (*In re Ill.-Cal. Express, Inc.*), 72 B.R. 987, 991 (D. Col. 1987) (debtor was authorized to take actions in the ordinary course of business without court approval under the Code; the Act's prior approval requirement was not continued under the Code); *Lasich v. Wickstrom* (*In re Wickstrom*), 113 B.R. 339, 350 (Bankr. W.D. Mich. 1990) (rejecting the 'no harm, no foul' doctrine developed under the Bankruptcy Act because it does not reflect the fact that exempt property becomes property of the estate under the Code).

b. *Prudential Standing Principles Do Not Support the Judicial Imposition of the Pecuniary Interest Test*

Although it is well-settled that “Congress legislates against the background of [the Court’s] prudential standing doctrine,”<sup>125</sup> this assumes an established prudential doctrine at the time of passage. As noted previously, the person aggrieved requirement was statutory prior to the repeal of the Act, not prudential.<sup>126</sup> The pecuniary test for bankruptcy appeals was not an extension of common prudential standing standards; it was an interpretive standard that, at most, tracked the rationale of the zone of interests test in order to discern the statutory meaning of “person aggrieved.” Whatever it may tell us about congressional intent under the Act, superimposing this standard today tells us nothing about congressional intent with respect to a particular provision of the Code.

Even if the prudential standing backdrop contemplated by Congress somehow included knowledge that courts would continue to apply the person aggrieved standard after its repeal, the current test is not an extension of the established person aggrieved standard under the Act. The term “person aggrieved” was not defined in the Act<sup>127</sup>, and General Order XXVII did not expressly require a pecuniary interest to appeal an order of the referee.<sup>128</sup> Early decisions interpreting section 39(c) focused more on the right to appeal interlocutory orders<sup>129</sup> and, after the Chandler Act in 1938, whether appeals were timely filed.<sup>130</sup> The few reported cases to focus on the meaning of “person aggrieved” recognized that a party could be aggrieved by not only financial injuries but also non-pecuniary injuries. Likewise, General Order XXVII was widely interpreted as merely requiring a direct interest in the specific subject matter of the issue.<sup>131</sup> Moreover, as

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<sup>125</sup> *Bennett v. Spear*, 520 U.S. 154, 163 (1997).

<sup>126</sup> *See supra* Part II.B.

<sup>127</sup> *See* 11 U.S.C. §§ 101–1200 (1976) (repealed 1978).

<sup>128</sup> *See supra* note 78.

<sup>129</sup> *See, e.g., Travelers Cas. & Sur. v. Corbin (In re First Cincinnati, Inc.)*, 286 B.R. 49, 52–53 (B.A.P. 6th Cir. 2002); *Duckor Spradling & Metzger v. Baum Trust (In re P.R.T.C., Inc.)*, 177 F.3d 774, 778–79 (B.A.P. 9th Cir. 1999); *Menk v. Lapaglia (In re Menk)*, 241 B.R. 896, 913 (B.A.P. 9th Cir. 1999).

<sup>130</sup> *See, e.g., Pfister v. N. Ill. Fin. Corp.*, 317 U.S. 144 (1942).

<sup>131</sup> *In re Henry Wood Sons Co.*, 279 F. 608, 608 (D. Mass. 1922) (“While that order [General Order XXVII] does not in express terms limit the right of review to parties having an appealable interest in the subject-matter of the petition for review, it has been so understood and construed.”).

noted earlier, the current application of the standard to *all* appeals is not consistent with practice under the Act.<sup>132</sup>

In spite of this history, most contemporary discussions of the person aggrieved standard assume that it consistently required a pecuniary interest. This assertion is supported by sweeping statements such as Judge Sanborn's "common sense" application of the standard in *Hartman*.<sup>133</sup> These cases, however, assumed that only pecuniary rights were contemplated under the Act and often ignored whether the specific provisions at issue were designed solely to protect pecuniary interests. To that end, notwithstanding the language that was used, they do not stand for the proposition that all appeals in bankruptcy should be governed by a pecuniary test.<sup>134</sup> Indeed, this is precisely the sort of generalization that Chief Justice Marshall cautioned against misreading years ago:

It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.<sup>135</sup>

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<sup>132</sup> See *supra* Part II.B.a.

<sup>133</sup> See *Hartman Corp. of Am. v. United States*, 304 F.2d 429, 431 (8th Cir. 1962).

<sup>134</sup> Cf. *Office of Commc'n of the United Church of Christ v. FCC*, 359 F.2d 994, 1000-01 (D.C. Cir. 1966) (Burger, J.) (concluding in a communications law context that "courts have resolved questions of standing as they arose and have at no time manifested an intent to make economic interest and electrical interference the exclusive grounds for standing").

<sup>135</sup> *Cohens v. Virginia*, 19 U.S. 264, 399-400 (1821). Justice Jackson, writing for a unanimous court, mirrored this sentiment more than a century later:

It is timely again to remind counsel that words of our opinions are to be read in the light of the facts of the case under discussion. To keep opinions within reasonable bounds precludes writing into them every limitation or variation which might be suggested by the circumstances of cases not before the Court. General expressions transposed to other facts are often misleading.

c. *The Modern Person Aggrieved Test is Inconsistent with Prudential Standing Principles*

As previously noted, prudential standing at its core is a principle of judicial restraint. Although the pecuniary test applied under the Act, like the prudential standards employed at the bankruptcy court level today, advanced the purposes of the specific provisions of the Act to which the test might be applied, the modern test for bankruptcy appellate standing is often applied where it does not serve any such purpose and, to the contrary, arguably conflicts with legislative intent.<sup>136</sup> Indeed, most discussions of the need for this test focus exclusively on the judiciary's desire to limit bankruptcy appeals.<sup>137</sup> The Ninth Circuit, for example, concluded that the standard:

[E]xists to fill the need for an explicit limitation on standing to appeal in bankruptcy proceedings. This need springs from the nature of bankruptcy litigation which almost always involves the interests of persons who are not formally parties to the litigation. In the course of administration of the bankruptcy estate disputes arise in which numerous persons are to some degree interested. Efficient judicial administration requires that appellate

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*Armour & Co. v. Wantock*, 323 U.S. 126, 132–33 (1944); *see also* *Night Clubs, Inc. v. City of Fort Smith*, 163 F.3d 475, 478 (8th Cir. 1998); *accord* *United Gas Improv. Co. v. Cont'l Oil Co.*, 381 U.S. 392, 404 (1965) (noting that the reference to “leases” in a prior opinion “should not be taken to cover more than the particular kind of leases that were before the Court; it should not be considered as embracing each and every transfer that can be put in lease form.”).

<sup>136</sup> As explained in, *Center for Auto Safety v. National Highway Traffic Safety Administration*:

When Congress has conferred standing, it matters not one iota if a large number of people share the injury and would benefit from its redress. The courts may appropriately function as the guardians of majority interests, without weakening the separation of powers, when Congress has decided to grant them that role. Indeed, far from preserving the separation of powers, when Congress has spoken, the courts place themselves in conflict with the legislative branch if they ignore the statutory message.

793 F.2d 1322, 1337 (D.C. Cir. 1986); *see also* *Davis ex rel Davis v. Philadelphia Hous. Auth.*, 121 F.3d 92, 105 (3d Cir. 1997) (Cohen, J., dissenting) (adopting prudential standing criteria to alter the balance struck by Congress is “precisely what the prudential standing requirements were designed to obviate”).

<sup>137</sup> *See, e.g.,* *Cult Awareness Network, Inc. v. Martino (In re Cult Awareness Network)*, 151 F.3d 605, 609 (7th Cir. 1998).

review be limited to those persons whose interests are directly affected.<sup>138</sup>

Under this view, the imposition of a pecuniary interest requirement provides an important limiting function. As the Seventh Circuit explained:

If we except the Cult Awareness Network from the pecuniary interest rule, it is unforeseeable how many other exceptions would have to be made for other debtors with substantial but nonpecuniary interests. We see no logical reason to make an exception for a debtor with a Lanham Act interest and not a debtor with an antitrust concern, or an environmental concern, or any one of countless other important but nonpecuniary concerns. Our bankruptcy system works because it processes debtors and their creditors in, we hope, an expeditious manner. Making exceptions would complicate the process unnecessarily. As the Fourth Circuit stated: Courts consistently have noted a public policy interest in reducing the number of ancillary suits that can be brought in the bankruptcy context so as to advance the swift and efficient administration of the bankrupt's estate. This goal is achieved primarily by narrowly defining who has standing in a bankruptcy proceeding.<sup>139</sup>

In other words, the public policy of expediting bankruptcy administration justifies the refusal to consider public policy and other non-pecuniary interests that may be affected. But there is no basis in common law, the separation of powers doctrine, or the Code for courts to refuse to review appeals for the singular purpose of limiting their judicial burden.<sup>140</sup>

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<sup>138</sup> *Fondiller v. Robertson (In re Fondiller)*, 707 F.2d 441, 443 (9th Cir. 1983).

<sup>139</sup> *Cult Awareness Network*, 151 F.3d at 609. In that case, the debtor attempted to challenge the sale of its trade name to an organization that it believed to be a cult. *Id.* In any case, it is doubtful that the debtor would have standing under the party in interest test either. The debtor, having turned over the assets of its estate, surrendered any financial, legal, or practical rights it had in the trademark upon its voluntary conversion to a chapter 7 liquidation case.

<sup>140</sup> *Cf. Smith, supra* note 75, at 1607 (criticizing opinion "guided by [the judge's] desire to limit the judiciary's role, as well as his belief that granting standing to this plaintiff would open the floodgates for more plaintiffs to claim this injury in the future" as an "abdication of] his responsibility to review a case in which the plaintiffs were properly before the court."). A mere benefit to judicial economy does not justify the intrusion into the legislative function. See generally *Magill v. State Employees' Ret. Sys. of Ill. (In re Lyons)*, 957 F.2d 444, 446 (7th Cir.

This is particularly true for bankruptcy appellate panels, whose *raison d'être* is to hear bankruptcy appeals.

It is also doubtful that the assumption behind this justification—that a massive spike in bankruptcy appeals will occur in the absence of the pecuniary requirement—has merit. This fear is based, at least in part, on the concern that anyone can contest and appeal any issue in a case as long as they are parties in interest with respect to any other issue in the case. As noted previously, status as a party in interest with respect to some proceedings does not necessarily bestow the same status with respect to other proceedings. Indeed, the legislative history expressly notes that the definition of the term depends on the context of the dispute; a party is not a party in interest with respect to a specific matter unless they have a sufficient interest in that matter.<sup>141</sup>

Moreover, if judicial burden alone is a sufficient reason to adopt a particular standing test, any arbitrary test can serve the same purpose. The fact that it is nominally based on a former statutory test is the classic distinction without a difference in this case. The requirement that a debtor be a merchant or be insolvent, as was the case under some prior federal bankruptcy laws, would reduce case loads far more than the person aggrieved test, but nobody is suggesting that the judiciary could resurrect these limitations. Whether or not courts applying judiciability doctrines in this fashion are “betraying Chief Justice John Marshall’s legacy and

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1992) (although contrary to goal of efficiency, a court cannot accelerate the distribution of debtor’s retirement contributions contrary to the limits of the Code); *Calvert v. Bongards Creameries (In re Schauer)*, 835 F.2d 1222, 1227 (8th Cir. 1987) (“the goal of administrative convenience must bow to a superior principle [in this case, the principle that bankruptcy does not create new substantive rights in property]”). *Cf. Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514–15 (2002) (“Whatever the practical merits of this argument, the Federal Rules do not contain a heightened pleading standard for employment discrimination suits. A requirement of greater specificity for particular claims is a result that ‘must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.’”) (quoting *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993)); *In re Hydrogen Peroxide Antitrust Litig.*, 401 F. Supp. 2d 451, 459 (E.D. Pa. 2005).

<sup>141</sup> The focus of the party in interest inquiry must be on “the particular purposes of the provision in question.” *See* 124 Cong. Rec. S17419 (daily ed. Oct. 6, 1978) (remarks of Sen. DeConcini); *see also id.* at H11102 (daily ed. Sept. 28, 1978) (remarks of Rep. Edwards). These purposes may be limited to narrowly-focused, discrete matters or involve a broad range of considerations in the case as a whole. *See infra*, Section III.A.



violating the principles of the Constitution they had sworn to protect",<sup>142</sup> they have crossed the line between adjudication and legislation.

*C. Current Problems in Application of the Person Aggrieved Test:  
The Asbestos Cases*

One area in which judicial policymaking is striking is in the recent wave of pre-packaged asbestos bankruptcy cases. The overwhelming burden of asbestos litigation and the lack of congressional action have encouraged courts to salvage these deals between asbestos personal injury attorneys and defendants, even if doing so requires the approval of plans of questionable validity and, at best, uncertain benefit to the victims of asbestos exposure. This retreat into the recesses of equity—such that prudential standing is applied and employed to the extent necessary to alternately preserve suspect deals, on the one hand, and strike down deals that, in the courts' eyes, have gone too far on the other—slips away from the limits and bounds of judicial discretion outlined by the Code. However admirable the goal, a brief survey of just two of these cases demonstrates the problems of such an approach and reinforces Sir Edward Coke's admonition that *talīs discretio discretionem confundit*.<sup>143</sup>

1. *In re Combustion Engineering, Inc.*<sup>144</sup>

In *In re Combustion Engineering, Inc.*, the debtor and its parent "communicated with several key players in the world of asbestos litigation to facilitate the design and implementation of a pre-pack plan. . . ."<sup>145</sup> The debtor, its corporate parent, key asbestos plaintiffs counsel, and a "futures representative" selected by these parties devised a "pre-packaged" plan, under which pre-petition claimants that participated in a pre-filing "Master Settlement Agreement" were to receive a percentage of their claims from a

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<sup>142</sup>Smith, *supra* note 75, at 1615; accord *United States v. Koyomejian*, 970 F.2d 536, 551 (9th Cir. 1992) ("That we are, for all intents and purposes, shielded from the rigors of the adversary process and Supreme Court review counsels more caution, greater restraint, a more thorough explanation of what we are doing and why. The majority's summary adoption of a code of procedure for video surveillance and its unskeptical deference to the rationale of other circuits is, I respectfully suggest, not consistent with the responsibility that devolves upon us as a court established under Article III of the Constitution.") (Kozinski, J., concurring).

<sup>143</sup>Roughly translated, "such a discretion confounds discretion." See SIR EDWARD COKE, THE REPORTS OF SIR EDWARD COKE, Part V (Rooke's Case) (1605).

<sup>144</sup>*In re Combustion Eng'g, Inc.*, 391 F.3d 190 (3d Cir. 2004).

<sup>145</sup>*Id.* at 204.

pre-petition trust. The remaining “stub claims” could be pursued in bankruptcy and would allow claimants settling under the MSA to retain creditor status (which would allow them to vote on the plan). Under the plan, all asbestos personal injury claims against the debtor (including stub claims) would be channeled to a post-petition trust, which, along with the debtor, would have the exclusive right under the plan to allow asbestos personal injury claims asserted against the trust.

The plan contemplated that insurance policies with a face value of more than \$400 million would provide a substantial portion of the funding for the post-petition trust. The insurers were not, however, allowed to supervise or review the claim approval process or participate in a meaningful way in the pre- or post-petition talks between the debtor, asbestos plaintiffs’ attorneys and the futures representative. Likewise, some asbestos plaintiffs referred to as the “Certain Cancer Claimants” were dissatisfied with the process and the proposed treatment of their claims. In light of these facts and the structure of the plan and pre-petition settlement, the insurers and Certain Cancer Claimants raised numerous objections to the plan, including:

- the issuance of an injunction under section 105(a) in favor of non-debtor affiliates with asbestos liabilities that were unrelated to the asbestos claims against the debtor violates section 524(g) and addresses rights and property that are outside the court’s jurisdiction and beyond the court’s equitable power under section 105(a);
- the tiered treatment of claims depending on participation (and timing of that participation) in the MSA gave rise to preferences and fraudulent transfers; and this treatment violated various provisions of chapter 11 and section 524(g) of the Code;
- the manufacturing of “stub claims” constituted artificial impairments designed to circumvent section 1129(a)(10)’s oversight function and establish a false “indicia of support” required to bind future claimants to the plan under section 524(g);
- the manipulation of voting and disparate treatment of claims under this structure violated the good faith requirement of 1129(a)(3); and

- the debtor's stock contribution did not comply with the requirements of section 524(g) because the debtor had no significant ongoing operations.

The bankruptcy court approved the parts of the plan that fell within its core jurisdiction and issued proposed findings of fact concerning non-core issues.<sup>146</sup>

The plan included a "super-preemptory provision" that purportedly preserved "the insurers' legal, equitable or contractual rights".<sup>147</sup> Accordingly, the bankruptcy court concluded that the insurers could not vote on the plan.<sup>148</sup> On appeal, the district court concluded that the insurers "lacked standing to appeal or object to Plan confirmation because their 'pecuniary interests [were] not directly or adversely affected' by the Plan."<sup>149</sup> The district court did not distinguish between matters in its core and non-core jurisdiction, including its decision to limit the scope of the super-preemptory provision to preserve the insurers' "claims."<sup>150</sup>

On appeal, the Third Circuit concluded that insurers had limited standing to contest the district court's modification of the super-preemptory provision and, ultimately, concluded that the modification was an impairment of the insurers' rights.<sup>151</sup> Yet the court also concluded that the insurers lacked standing as persons aggrieved to appeal other aspects of the district court's order.<sup>152</sup> This was largely academic, however, because nearly all of the objections raised by the insurers were also raised by the Certain Cancer Claimants, whose pecuniary interests were deemed sufficient to give them standing.<sup>153</sup>

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<sup>146</sup> *In re Armstrong World Indus.*, 432 F.3d 507, 510 (3d Cir. 2005) ("Because the Plan included a channeling injunction under section 524(g) of the Bankruptcy Code, the District Court was required to affirm the Bankruptcy Court's Proposed Findings and Conclusions before the Plan could go into effect."). To the extent that 524(g) requires the involvement of the district court, it may be argued that the matter has already been removed from the bankruptcy forum by law, so the person aggrieved test should not apply to any appeal concerning that section. *See supra* Part II.B.1.a.

<sup>147</sup> *Combustion Eng'g*, 391 F.3d at 209.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 216.

<sup>150</sup> *See In re Combustion Eng'g, Inc.*, 366 F. Supp. 2d 224 (D. Del. 2005).

<sup>151</sup> *Combustion Eng'g*, 391 F.3d at 218.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 223–24.

The Third Circuit's opinion with respect to the merits of the objections largely mirrors the assertions of the insurers and Certain Cancer Claimants.<sup>154</sup> The panel rejected the third-party injunction issued under 105(a), and it found numerous faults with the two-tier settlement and plan structure.<sup>155</sup> In sum, the court concluded that the plan was not confirmable due to its multiple violations of the protections intended by the Code, including the protections intended for future claimants under section 524(g).<sup>156</sup> The panel's opinion reveals that the court readily saw past the scheme to manufacture an illusion of compliance with the Code while circumventing its protections.

For the purposes of this paper, the extent to which the plan proponents in *Combustion Engineering* may have flouted the Code is secondary to the fact that a plan with so many fundamental violations of the spirit and terms of the Code would have survived—thereby fundamentally altering the litigation posture of the current claimants, debtors, insurers and future claimants—had the plan proponents simply “bought off” the Certain Cancer Claimants as well.<sup>157</sup> In that case, contrary to what our mothers told us, two wrongs would have made a right or, at least, allowed a wrong to avoid scrutiny on appeal. Yet this is precisely what the pecuniary interest focus encourages: Paying those creditors who make noise to be quiet and go away, while those without the ability to raise their concerns or with only non-pecuniary interests are forced to take whatever the plan proponents feel like giving them.<sup>158</sup>

## 2. Century Indemnity Co. v. Congoleum Corp. (*In re Congoleum Corp.*)<sup>159</sup>

In *Century Indemnity Co. v. Congoleum Corp.*, we find many of the same parties that were involved in *Combustion Engineering*.<sup>160</sup> This time, however, the proponents engaged representatives of “cancer claimants”

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<sup>154</sup> *Id.* at 239–47.

<sup>155</sup> *Id.* at 235–47.

<sup>156</sup> *Id.* at 234–35.

<sup>157</sup> The practice of “buying off” vocal creditors is hardly a new one; however, this reference is not intended to imply that the Certain Cancer Claimants would have accepted a deal of this sort.

<sup>158</sup> See *Avery*, *supra* note 72, at 435 (“The cost of participating in a bankruptcy proceeding is simply too high for the vast majority of creditors in bankruptcy cases.”).

<sup>159</sup> *Century Indem. Co. v. Congoleum Corp. (In re Congoleum Corp.)* 426 F.3d 675 (3d Cir. 2005).

<sup>160</sup> *Id.*; *Combustion Eng'g*, 391 F.3d at 190.

before finalizing a pre-petition settlement.<sup>161</sup> Moreover, the original plan did not include a super-preemptory clause and, in fact, contained provisions that expressly bound insurers to the plan.<sup>162</sup> To that end, the insurers were ultimately granted standing in bankruptcy court to contest, among other things, the retention professionals and the plan.<sup>163</sup>

Early in the case, a group of insurers objected to the retention of the debtor's proposed "special insurance counsel," Gilbert Heintz & Randolph, based on the ties between that firm and one of the leading asbestos personal injury plaintiffs' attorneys, Perry Weitz.<sup>164</sup> Gilbert Heintz had, in fact, been recommended to the debtors by Weitz (who also suggested that the company pursue a "pre-pack" bankruptcy), and the two had fee-sharing agreements in place in other asbestos bankruptcy matters.<sup>165</sup> Among the shared clients in one of these cases were two clients that Gilbert Heintz settled (on behalf of Congoleum) for \$16 million before moving forward with the bankruptcy planning.<sup>166</sup> The bankruptcy court ultimately approved the retention under section 327(e), and the insurers appealed to the district court<sup>167</sup> and, subsequently, to the Third Circuit.<sup>168</sup>

As in *Combustion Engineering*, the plan proponents in *Congoleum* responded to the insurers' objections by asserting that they lacked standing as persons aggrieved.<sup>169</sup> The panel acknowledged that the persons aggrieved test applies in bankruptcy, but distinguished *Congoleum* from *Combustion Engineering* on the basis that the latter was an appeal from a confirmed plan while the instant case was an "appeal from an order which will affect the fairness of the entire bankruptcy proceeding, including the determination of issues such as those for which we granted insurer standing to challenge a final order in *Combustion Engineering*."<sup>170</sup> Likewise, the attorneys' responsibilities to report ethical violations (as asserted against

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<sup>161</sup> Congoleum, 426 F.3d at 680–81.

<sup>162</sup> *Id.* at 680.

<sup>163</sup> *Id.* at 685.

<sup>164</sup> *Id.* at 682.

<sup>165</sup> *Id.* at 690.

<sup>166</sup> *Id.* at 689 n.15.

<sup>167</sup> The district court affirmed the bankruptcy court's order, noting that the insurers, as the primary source of payment, "have every interest in making it, to put it bluntly, difficult to confirm this bankruptcy, and that motivation is not lost on the Court." *Id.* at 684.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 686.

<sup>170</sup> *Id.* at 685 ("The retention of Gilbert as special insurance counsel will affect the resolution of issues that may directly affect the rights of insurers and fairness to the asbestos claimants.").

Gilbert Heintz in this matter) provided independent grounds for standing.<sup>171</sup> The court further explained:

We note also, as a practical matter, that in circumstances such as those present here, it is highly unlikely that any of the parties other than the insurers or their attorneys would challenge the application for retention of Gilbert. Congoleum, Gilbert, Perry Weitz and Joseph Rice worked together to negotiate the terms of the pre-packaged plan and all were deeply committed in having it approved. Moreover, we are aware that the standard set out in Travelers is a jurisprudential and not a strict statutory requirement for standing. We are persuaded that, in the circumstances here, the insurers and their attorneys have standing to present this appeal.<sup>172</sup>

Thus, the preservation of the integrity of the process justified looking past the “jurisprudential” pecuniary interest requirement.

The problem in *Congoleum* is not that the court failed to consider the pecuniary interest test; indeed, the court acknowledged the test and asserted that the insurers’ interests in the bankruptcy case were sufficient to give them standing. Rather, the court never clearly defined what those pecuniary interests—if any—were with respect to the insurers, and the absence of a qualifying pecuniary interest with respect to their attorneys is all but conceded. Notwithstanding circuit precedent that suggests otherwise,<sup>173</sup> perhaps the issues were sufficient to overcome prudential limits that are ordinarily considered, but it is also clear that the translation of these interests into pecuniary interests would have required an application of the pecuniary test that is far more inclusive than Third Circuit precedent to

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<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 687; see also *Kabro Assoc. of W. Islip, L.L.C. v. Colony Hill Assoc. (In Re Colony Hill Assoc.)*, 111 F.3d 269, 274 (3d Cir. 1993) (allegation of attempt by debtor and creditor to chill bidding “would call into question the ‘intrinsic fairness’ of the sale hearing” and noting that “when collusion occurs between a debtor, creditors and a successful bidder, the unsuccessful bidder may be the only party with an interest in exposing such inequitable conduct”).

<sup>173</sup> But see *Gen. Motors Acceptance Corp. v. Dykes (In re Dykes)*, 10 F.3d 184, 188 (3d Cir. 1993) (“A court employs standing doctrines when it refuses to consider a legal claim on the ground that, even though the claim may be meritorious, the litigant advancing it is not properly situated to raise it before the court. The focus is on the party, not the claim itself. The requirement of standing focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.” (quotation marks and citations omitted)).

date. Moreover, perhaps the most commonly-referenced opinion supporting the extension of the pecuniary interest test—*In re Fondiller*—involved the same question: whether a party without a pecuniary interest in a retention order had standing to appeal.<sup>174</sup> In short, in bypassing the pecuniary analysis, the panel implicitly recognized the imperfections of the pecuniary interest requirement and demonstrated the need to reframe appellate standing in bankruptcy.

The panel's rationalization that *Congoleum* involved "an order which will affect the fairness of the entire bankruptcy proceeding"<sup>175</sup> rings hollow, since it is difficult to understand how plan objections that go to the heart of the "fairness" of the process as a whole provide any less reason to refuse to be bound by the pecuniary test. Indeed, in a section 524(g) case, the fairness and integrity of the process is essential given the impact on future claimants' rights.<sup>176</sup> This justification is not based on the specific injury to any individual's substantive financial or legal rights; it focuses on every party's right to a fair process.<sup>177</sup> Moreover, given that many cases are now managed by debtors in possession instead of independent trustees,<sup>178</sup> parties without direct pecuniary interests may, in some circumstances, be the only parties with an interest in advancing these and other objectives of the Code.<sup>179</sup> These objectives are no less important than managing the courts'

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<sup>174</sup> See *Fondiller v. Robertson* (*In re Fondiller*), 707 F.2d 441, 442–43 (9th Cir. 1983).

<sup>175</sup> *Congoleum*, 426 F.3d at 685.

<sup>176</sup> See *id.* at 693–94.

<sup>177</sup> See *Talcott v. Friend*, 179 F. 676, 681 (7th Cir. 1909) (party in interest could object to discharge under the Act even though the fraud was committed against another party).

<sup>178</sup> See *Coltex Loop Cent. Three Partners v. BT/SAP Pool C Assocs.* (*In re Coltex Loop Cent. Three Partners*), 138 F.3d 39, 44 (2d Cir. 1998) (with many cases now administered by the debtor in possession, "the former protections against self-dealing afforded by trustee and bankruptcy judge control are no longer present").

<sup>179</sup> The United States Trustee is intended to serve an oversight role, but its ability to fill this role is far from uniform across regions and has drawn criticism. See *McGuirl v. White*, 86 F.3d 1232, 1236 (D.C. Cir. 1996) ("Although Congress has given the United States Trustee authority to monitor applications for compensation and reimbursement, the Trustee is not obligated to do so, and perhaps because of insufficient resources, the Trustee's system of review is generally inadequate." (citations omitted)). Likewise, the presence of official committees and other officials is no panacea. These representatives often serve multiple competing interests that may be better served by refusing to press a motion or objection. Other officials serve discrete functions within the case that are not well-suited to identifying and advancing other considerations.

dockets, particularly where questions of abuse, fraud and other impropriety are at issue.<sup>180</sup>

Finally, the *Combustion Engineering* panel's emphasis on the super-preemptory clause as ensuring that insurer rights are fully preserved ignores the factual, practical, and procedural circumstances and consequences of the potential outcomes of coverage litigation. As an initial matter, it is difficult to imagine that a confirmed bankruptcy plan will have no legal or factual impact on how events unfold in coverage litigation. Even assuming the trial court is willing to accept that the confirmed plan has no legal significance on the posture of the parties, courts are highly unlikely to completely ignore the practical impact of denying asbestos claimants compensation (in this case, by denying the asbestos trust access to its primary source of funding). Indeed, a compelling case can be made that such extra-legal considerations were significant factors in the asbestos litigation explosion.<sup>181</sup>

If insurers prevail in coverage litigation, and are thereby not required to fund the asbestos trust, it is the height of naïveté to conclude that this would be the end of the story. To the contrary, history again demonstrates that in the face of a financial shortfall, a new wave of litigation will most likely result.<sup>182</sup> Moreover, ignoring obvious conflicts of interest and other actions that raise questions about the inherent fairness of the process only invites litigation from those who become ill in the future and increases the likelihood that their challenges will be successful. Thus, rather than conserving judicial resources, allowing a largely untested 524(g) plan to go into effect (and potentially fail due to inadequate controls or otherwise) would place a greater burden on judicial resources in the long term.

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<sup>180</sup> Indeed, many of the recent amendments to the Code were designed for the express purpose of preventing fraud and abuse. H.R. Rep. No. 109-31(1), at 47 ("S. 256 is intended to improve the bankruptcy system by deterring abuse . . .").

<sup>181</sup> See generally John A. Siliciano, *Mass Torts and the Rhetoric of Crisis*, 80 CORNELL L. REV. 990 (1995); see also Richard O. Faulk, *Dispelling the Myths of Asbestos Litigation: Solutions for Common Law Courts*, 44 S. TEX. L. REV. 945 (2003); Victor E. Schwartz & Rochelle M. Tedesco, *The Law of Unintended Consequences in Asbestos Litigation: How Efforts to Streamline the Litigation Have Fueled More Claims*, 71 MISS. L.J. 531 (2001).

<sup>182</sup> Cf. *Findley v. Trs. of the Manville Pers. Injury Settlement Trust (In re Joint E. & S. Dists. Asbestos Litig.)*, 237 F. Supp. 2d 297 (Bankr. S.D.N.Y. 2002) (discussing the extensive litigation history of the Manville Trust since its insolvency); Georgene Vairo, *Mass Torts Bankruptcies: The Who, the Why and the How*, 78 AM. BANKR. L.J. 93, 109 (2004) (discussing potential litigation concerning underfunded asbestos trusts).



#### IV. THE RETURN TO COMMON SENSE: CASE-SPECIFIC INTEREST DETERMINATIONS AND PRUDENTIAL STANDING

As noted previously, prudential standing "is founded in concern about the proper—and properly limited—role of the courts in a democratic society."<sup>183</sup> Traditional prudential standing principles address this concern by weeding out marginal parties with merely incidental injuries without imposing narrow and unyielding mechanical standards. Case-by-case judgment calls necessarily involve consideration of a variety of factors—the statutory design, the nature of the party's interest, the potential injury to those interests, and whether the party's contribution will advance the purposes of the law just to name a few. Parties must raise their own rights, and these rights must fall within the scope of interests that the statutory provisions at issue are designed to protect, directly or as part of the bankruptcy case. These principles avoid encroaching on the functions of the other branches of government by not only denying standing to marginal parties but also by recognizing the standing of parties whose interests or participation are contemplated by the statute. If applied properly, they provide a sufficient check against excessive litigation without sacrificing the rights of those with a significant stake in a case or proceeding.

Further, in the absence of intrusion into the legislative or executive role, the balance should tilt in favor of review. The greatest problems faced by the bankruptcy system today are not ones of excessive oversight; to the contrary, many of these problems—including the lack of consistency in applying the Code, high reorganization failure rates, and high administrative fees—are symptomatic of the excessive emphasis on speed and demand more oversight and guidance, not less. As one commentator noted:

The high costs of administration of bankruptcy cases may stem, at least in part, from the fact that there often is no adversarial sharpening of the issues; therefore, costs are higher than they would be if resolved in a true case or controversy context. By placing an undue premium on negotiation, the Code deprives the courts of their traditional tools for making sound judgments. Hence, confirmed chapter 11 and chapter 13 plans are unlikely to be

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<sup>183</sup> *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

performed, the professional fees to create them swell, and the system fails to achieve its ends in a myriad of ways.<sup>184</sup>

Parties that know in advance that they must be able to demonstrate that their actions are consistent with the Code will be less likely to play fast and loose with its protections, and additional guidance from controlling authorities will help clarify how parties can devise plans that comply with the Code. Moreover, as bankruptcy continues to expand into more aspects of our personal and professional lives, the supervision of less specialized Article III judges becomes even more critical. The time and expense of bankruptcy cases are clearly an important consideration, but we must inject some “common sense” into the process if we are to ensure that more and more of our values and our quality of life are not swept aside as being irrelevant non-pecuniary interests whenever a bankruptcy intervenes.

Rather than another arbitrary test, what follows are some basic considerations that are common to prudential standing generally or may help guide the development of the party in interest standard. Part statutory interpretation and part prudential understanding, these guidelines may not be a final, definitive answer to who should have standing across issues, but they demonstrate that a bankruptcy system without one narrow, yet overarching, prudential standard for appeals is hardly a chaotic one. To the contrary, a system in which parties in interest are authorized to appeal unless the Code expressly provides otherwise better reflects to statutory design and reduces the risk of fraud and abuse.

#### *A. Discerning the Scope of Interests Protected*

An important element of the party in interest standard is its recognition of the distinct, often varied interests served by individual sections of the Code.<sup>185</sup> Many provisions of the Code are designed to serve a specific purpose for the benefit of a limited group of parties, and the prohibition on asserting the rights of others ensures that appeals concerning these matters remain limited. Moreover, in contrast to the arbitrary pecuniary standard, the party in interest requirement emphasizes the case-by-case balancing of interests as part of the analysis:

The determination [of whether a party is a party in interest] also calls for a delicate balancing of competing

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<sup>184</sup> See Avery, *supra* note 72, at 448–49.

<sup>185</sup> See *infra* Part I.B.1.a.

considerations. On the one hand, courts and commentators have recognized that the term should be broadly construed so as to allow all parties affected by a chapter 11 proceeding to be heard, yet, as one court noted, "overly lenient standards may potentially over-burden the reorganization process by allowing numerous parties to interject themselves into the case on every issue, thereby thwarting the goal of a speedy and efficient reorganization . . . . Granting peripheral parties status as parties in interest thwarts the traditional purpose of bankruptcy laws which is to provide reasonably expeditious rehabilitation of financially distressed debtors with a consequent distribution to creditors who have acted diligently."<sup>186</sup>

Applying the party in interest standard to appeals is consistent not only with the statutory language but also with the direct and substantial interest requirement that is regularly applied in other contexts and to appeals from district courts to courts of appeal under the Act.<sup>187</sup> As Professor Martin reasoned:

There are several reasons to take a broader approach to standing. First, as discussed above, the statute clearly permits courts to grant standing more freely and may even require it. Second, other federal courts do not limit standing to those with pecuniary interest. To have standing in other courts, one must have only a direct and substantial interest; the injury need not be financial or the resulting obligation immediately due and payable. Nothing in the Bankruptcy Code itself modifies this standard . . . . Regardless of the precise standard adopted, standing in bankruptcy need not rest on the existence of a financial interest.<sup>188</sup>

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<sup>186</sup> *Peachtree Lane Assocs. v. Granader (In re Peachtree Lane Assocs.)*, 188 B.R. 815, 824-25 (N.D. Ill. 1995) (quoting *In re Ionosphere Clubs, Inc.*, 101 B.R. 844, 850-51 (Bankr. S.D.N.Y. 1989)) (citations omitted).

<sup>187</sup> See, e.g., *Am. Benefit Life Ins. Co. v. Baddock (In re First Colonial Corp. of Am.)*, 544 F.2d 1291, 1296 (5th Cir. 1977); *Edell v. Di Piazza*, 345 F.2d 336 (5th Cir. 1965).

<sup>188</sup> See Martin, *supra* note 72, at 458-59.

In addition, the emphasis on viewing the purpose of a provision separately and as part of the overall statutory scheme provides a more well-rounded understanding of how the provision should operate. The critical question in this analysis is whether the appellant has a direct and substantial interest in the issue, regardless of whether this interest stems from the specific matter in isolation or as part of the case generally. In turn, this understanding provides a framework for considering whether a party's interest in the proceeding or case, collectively or separately, is sufficient to require representation. This two-part assessment may allow more parties to be heard, but it may also reveal limitations on standing that are part of the overall statutory design.

### 1. Proceeding-Specific Interests

The emphasis on case-by-case determinations, of course, will require greater consideration of the specific provisions of the Code and how they interrelate with the rest of the Code. But this is no more than statutory analysis injected with a straightforward assessment of the interests served by participation. Adequate protection under section 361, for example, is intended to protect a distinct set of parties that varies depending on what they hope to protect. If another party in interest believes the solution to be wasteful, they must demonstrate that their interests are substantial and directly implicated. If not, then they must establish that the impact on their interests within the case is sufficient to make them more than a mere marginal party to the proceeding.

To be clear, this is not to say that the pecuniary interest test should be discarded in its entirety. It may be much easier to understand the dynamic when a provision is clearly designed to protect a specific, narrow pecuniary interest and the pecuniary interest test can play an important role in discerning what interests fall within the zone of interests of that provision. But it should be just that—one test designed to assist with the consideration of standing where only pecuniary interests are protected. The problem lies with holding to the erroneous view that this narrow standard is relevant to any interests represented or issues that arise in a case or proceeding.

### 2. Case-wide Interests

It is critical to recognize at the outset that there is a distinction between interests in ensuring that the law is followed and interests in maintaining the integrity of the process. While the two overlap at times, the latter is limited

to those whose substantial rights or interests may be modified by the case and, accordingly, should have a voice in those matters with case-wide significance. Regardless of the pecuniary or non-pecuniary nature of a party's interests, the requirement that the process be fair and equitable, for example, is the same: There is no statutory or policy justification for allowing the fraudulent or collusive alteration of non-pecuniary interests but not pecuniary interests.

All proceedings have some effect on the bankruptcy case. And section 1109(b) does not distinguish between status as a party in interest in the case as a whole and as a party in interest with respect to specific proceedings. But it is only where the proceeding may injure the party's interests (and those interests are not otherwise adequately represented) that interest in a case should afford a party standing with respect to a specific proceeding.<sup>189</sup> After all, a party in interest must still demonstrate an injury to satisfy Article III—an actual or imminent invasion of a legally protected interest—that will be remedied by the requested relief. An attenuated interest linked to a specific proceeding only by reference to the interest in the case as a whole seems, at best, a stretch of imagination where the proceeding has only a limited impact on the case. Conversely, when an action is significant in the context of the larger case, then the invasion of such a party's interests is far less difficult to discern.

In addition, there are some aspects of the process that are designed to protect the rights of all parties in interest and ensure that the Code is not manipulated to circumvent its protections. Some actions within a case necessarily have a significant impact on the case as a whole and include safeguards that protect multiple interests in the case. As already noted, prudential standing should not be a barrier where there are supportable allegations of fraud, abuse or other impropriety because these speak to the very integrity of the process. Likewise, provisions designed to punish improper activities may serve parties in interest indirectly by deterring improper actions, but once they occur, the statute only serves this purpose if these actions in fact result in punishment. Thus, the refusal to consider the matter based on the mistaken view that a party was not harmed in itself causes injury to the parties in interest in the case. These elements all look to the process rather than second-guessing decisions within the business judgment of the debtor in possession or trustee. And the court's refusal to adjudicate these issues in the name of prudence turns prudential standing on

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<sup>189</sup> See *supra* Part III.A.2.

its head; prudent adjudication is just that—adjudication—where the Code contemplates judicial oversight.

### *B. Assertion of Other Parties' Rights*

Of course, the prohibition on asserting other parties' rights is well-grounded in bankruptcy as it is in other areas of law. But care should be taken to ensure that a party's interest in the case generally is not mistaken for asserting another party's interest in the proceeding specifically. A party that challenges the retention of the trustee's attorney does so not to protect the trustee's interests in having a disinterested attorney but to protect its own interest in the preservation of the integrity of the process. Likewise, if a right granted by the Code will be impaired by a proceeding, the fact that a party may not yet need to exercise that right to protect its interests (*i.e.*, because it is contingent or other potential means for protecting those interest exist) does not change the fact that the party has a distinct, personal interest in preserving that right.

### *C. Standing and Balancing of Interests*

The conclusion that a party has standing to be heard under this analysis does not require any substantive balancing of pecuniary and non-pecuniary interests. In many cases, this balancing is already fixed in the statute. The right to assume a lease under section 365, for example, comes with the condition of going-forward compliance with non-pecuniary conditions of the lease regardless of the financial benefit of ignoring those conditions. In other circumstances, balancing is not required because of the nature of the inequitable action—a process that is tainted by fraud or collusion is not cleansed by the fact that some parties in interest may benefit from the inequitable process. Even where a balancing of pecuniary and non-pecuniary interests may be required, this balancing of interests is a question of substantive rights under the statute; it is not one of standing.

## V. CONCLUSION

The policies and structure of federal bankruptcy law, as well as the necessary conditions for appellate standing in bankruptcy, have changed dramatically since the repeal of the Bankruptcy Act. Unfortunately, they have been moving in opposite directions. Even as Congress continues to expand the scope of non-pecuniary interests protected by the Code, federal

courts continue to restrict the rights of the parties asserting these interests to be heard on appeal.

The superficial references to prudential standing and interpretive principles, as well as selective references to the standard to appeal referee orders under the 1898 Act, do not support the current pecuniary interest requirement; to the contrary, the “practical common sense” assessment of these references suggests that the current formulation of the pecuniary requirement unduly limits the right to be heard. The standard far exceeds the scope of, and narrows the right to be heard far more than, its statutory predecessor. The judicial restoration of a standard Congress chose to omit from the Code is not supported by reference to the past practices or prudential standing doctrines. And the base assumption that the absence of this test will result in an unmanageable number of appeals is not only unsupported, it ignores the structural safeguards of the Code and the significant limits that a case-by-case application of traditional prudential standards would provide.

By refusing to hear appeals that are properly before them, courts have effectively written out protections provided by the Code for the singular purpose of reducing their caseload. Ironically, the failure to guide lower courts in the name of judicial economy has, in some cases, sparked considerably more litigation. The judicial imposition of the pecuniary interest standard, as opposed to any other standard, is not grounded in any statutory or other cognizable legal authority or principle. It advances no statutory purpose and is not guided by separation of powers principles. At most, it is a policy conclusion that non-pecuniary interests should take a back seat to judicial convenience. Under the circumstances, the refusal to hear a party is not prudential judicial restraint; it is judicial legislation by inaction and contrary to the fundamental purpose of the prudential standing doctrine.